Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALLEN V. JAFFE,

Petitioner,

v.

VIRGINIA PHOTOTHERAPY, L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CENTIORARI TO THE SUPREME COURT OF VIRGINIA, CITY OF RICHMOND

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This court should grant certiorari to clear up confusion as to whether during a motions hearing the courts must consider whether the party asserting Res Judicata must present evidence to prove by a preponderance that the issues asserted as bars were previously raised so as to assure a fair and impartial hearing guaranteed under the 14th amendment.

2. This court should grant certiorari and decide whether on plea of Res Judicata, the courts must consider whether a lower court judge in a current action may simply take judicial notice of the record in previous actions and dispense with the necessity of proof of record of those previous actions in which that same judge presided, in determining the outcome of the current matter before.

3. This court should grant certiorari to decide whether the court must consider whether the dismissal of a matter for lack of jurisdiction under the Virginia Medical Malpractice Act may serve as a bar under Res Judicata to future actions.

4. This court should grant certiorari and decide the most fundamental issue of fairness and impartiality guaranteed under the 14th with regard to whether a lower court judge on motion to disqualify for bias and prejudice, does in fact disqualify and recuse themself from those matters to which recusal had been sought then , should that judge be able to affect the determinations of those matters from which they are then barred.

5. This court should grant certiorari and decide whether on a petition for appeal, a higher court should consider an appellant's submitted statement of facts, in lieu of transcripts, when all the requirements necessary for admission of that statement of facts have been satisfied, but for the lower court judge's refusal to sign, or amend and sign such statement for admission when such a refusal serves to defeat the appellant's right of appeal.

6. This court should grant certiorari and decide whether in denying an appeal, the court should have considered an order correcting Nunc Pro Tunc, a previous fraudulent order, as being Nunc Pro Tunc to the *date of the original final order so as not to affect an appellant's right of appeal* with regard to *the determination of appellate jurisdiction and filing time requirements*.

PARTIES TO THE PROCEEDING

Petitioner is Allen V. Jaffe, pro se, who was the plaintiff, pro se, in the circuit court, and the appellant, pro se, before the Virginia Supreme Court.

Respondent is Virginia Phototherapy, L.L.C., a Virginia limited liability company which was the defendant in the Circuit Court and the appellee before the Virginia Supreme Court.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceeding	iii
Table Of Contents	iv
Table Of Citations	v
Table Of Appendices	xi
Opinions Below	1
Statement Of Jurisdiction	1
Constitutional and Statutory Provisions Involved	3
Statement Of The Case	6
Reasons For Granting The Petition	13
Conclusion	25

TABLE OF CITATIONS

CASES *Page*

Agar v. Winslow,
123 Cal. 587 19

Arnold v. Eastern Airlines, Inc.,
712 F.2d 899 (4th Cir. 1983) 20

Bierce v. Hutchins,
205 U.S. 341 18

Bistine v. United States,
229 Fed. 546 ..... 18, 19

In re Cement Antitrust Litigation,
673 F.2d 1020 (9th Cir. 1982) 20

Council v. Commonwealth,
198 Va. 288, 94 S.E.2d 245 (1956) 24

Cromwell v. County of Sac.,
94 U.S. 351 20

Cutshaw v. Cutshaw,
220 Va. 638, 261 S.E.2d 52 (1979) 24

Darnell v. Barker,
179 Va. 86, 18 S.E.2d 271 (1942) 16

DeCancino v. Eastern Airlines, Inc.,
283 S.2d 97 (Fla. 1973) 16

Cited Authorities

Page

Dixon v. Pugh,
244 Va. 539, 423 S.E.2d 169 (1992) 24

El Fenix De Puerto Rico v. The M/Y Johanny,
36 F.3d 136 (1st Cir. 1994) 20

Eugene H. Proctor, Jr. v. Town Of Colonial Beach,
425 S.E.2d 818, 15 Va. App. 608, Va. 0734 22

Highsmith v. Commonwealth,
25 Va. App. 440, 489 S.E.2d 14, 18

Johnson Steel Street Rail Co. v. William Wharton, Jr., & Co., 152 U.S. 252, 261, 14 S. Ct. 608,
38 L. Ed. 429 14

Lamb v. Commonwealth,
222 Va. 161, 279 S.E. 2d 389 (1981) 24

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855
(1988) 21

Mcelmoyle v. Cohen,
13 Pet. 312 20

McLaughlin v. Austin,
104 Mich. 489 19

Moody v. Simmons,
858 F.2d 137 (3d Cir. 1998) 20

Cited Authorities

Page

Mowry v. City of Virginia Beach,
198 Va. 205, 93 S.E.2d 323 (1956) 13-14, 18

Netzer v. Reynolds,
231 Va. 444, 345 S.E.2d 291 (1986) 24

Newton v. Newton,
202 Va. 96, 116 S.E.2d 94 (1960) 16

Northern Assurance Co. v. Grand View Building Association,
203 U.S. 106 18

Rohrbach v. AT & T Nassau Metals Corp.,
915 F. Supp. 712 (M.D. Pa. 1996) 20, 21

Southern Pacific Co. v. Bogert,
250 U.S. 483 18

Stone v. Robinson,
218 S.W. 5 19

Townsend v. Jemison,
9 How. 406 20

Tullos v. Mayfield,
198 S.W. 1073 19

Cited Authorities

Page

U.S ex rel. Carrono v. Richmond,
177 F. Supp. 504 (D. Conn. 1959) 2

Ward v. Monroeville,
409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972)
..... 21

Whitehead v. Nevada Commission On Judicial Procedure,
920 P. 2d (Nev. 1996) 21

Williams v. Florida,
399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed 2d 446
(1970) 2

Wright v. Castles,
232 Va. 218, 222 S.E. 2d 125 (1986) 13, 14, 18

UNITED STATES CONSTITUTION

Fourteenth Amendment ..... i, 3, 13, 23

STATUTES

Va. Code 8.01-272 .....5, 8, 9

Va. Code 8.01-275 .....5, 7, 9

Va. Code 8.01-428(b) 6, 24

Cited Authorities

Page

Va. Code 16.1-93 ..... 4, 7, 8, 9

28 U.S.C. § 1257 ..... 1, 2, 3, 4

RULES

Rule 5a:8(c)(2) 23

Rule 8(d) 23

OTHER AUTHORITIES

30 Am Jur., Judgements,
Sec. 224 14

30 Am. Jur., Judgements,
Sec. 273 15

30 Am. Jur., Judgements,
Sec. 274 16

50 C.J.S., Judgements,
Sec. 771 14

50 C.J.S., Judgements,
Sec. 836 15

50 C.J.S., Judgements,
Sec. 843-c 16

Cited Authorities

	Page
Burk's Pleading and Practice, § 357 (4th Ed. 1952)	16
Charles A. Wright, Arthur Miller & Edward H. Cooper, Federal Practice and Procedures, 13a (2d Ed. 1984)	20
Freeman on Judgements, 5th Ed., Sec. 1030	16
Jones' Commentaries On Evidence, 2d Ed. 1886	13

TABLE OF APPENDICES

Page

Appendix A — Order Of The Supreme Court Of Virginia, City Of Richmond Denying Petition For Appeal Dated June 25, 2003 ..... 1a

Appendix B — Final Order Of The Circuit Court Of The County Of Henrico Dated April 29, 2003 ..... 3a

Appendix C — Order Of The Circuit Court For The Couty Of Henrico Dated January 24, 2003 ..... 5a

Appendix D -- Order Of The Supreme Court Of Virginia Denying Petition For Rehearing Dated September 12, 2003 ..... 7a

Petitioner respectfully petitions for a Writ of Certiorari to review the judgements of the Circuit Court and the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the supreme court of Virginia record no. 030874 concerning the circuit court matter styled CL02-1730-00 dated June 25, 2003, denying Allen v. Jaffe's direct appeal is attached as appendix A, the order denying Jaffe's petition for rehearing dated September 12, 2003, is also attached as appendix D. The circuit court fraudulent order submitted by the defendant, is attached as appendix C, and the corrected legitimate order signed on April 29, 2003, is attaches as appendix B.

STATEMENT OF JURISDICTION

The jurisdiction of the court is invoked under 28 U.S.C. § 1257, which states that writs will be issued from "final judgements and decrees rendered by the highest court of a state in which a decision could be had." Petitioner had originally planned to base his appeal on numerous ruling errors committed during the hearing on January 24, 2003, which he expected to be memorialized in the order submitted by the defendant/appellee counsel, but conflicts which resulted from the fraudulent order submitted by the appellee counsel and the exclusion of a properly submitted Statement of Facts because of the refusal of the judge to sign it, served to defeat appellant's Right of Appeal.

In an article entitled, "Commentary on 1988 revision," appearing after 28 U.S.C. § 1257, David Siegel observed that the statute governing Writs of Certiorari to state courts allows

review of "not just a decision of the highest court in which a decision could be had." Observing that this language was the same as what appeared before the 1988 revisions, Mr. Siegel said it "takes note of the internal strictures a state may impose on appeals within its own court system, perhaps stopping a case at some lower level and barring it from review by the state's highest court. A lower federal court has held that, where a higher state court is by constitution or statute without power to review a decision of a lower court, the decision of the lower court becomes the decision of the highest court within the meaning of 28 U.S.C. §§ 1257, giving the United States Supreme Court power to review final judgements by the highest court of the state in which a decision could be had, *U.S. ex rel. Carrono v. Richmond*, 177 F. Supp. 504 (D. Conn. 1959). The Supreme Court granted Certiorari in *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970) to an intermediate appellate court which had affirmed a trial judge's enforcement of the Florida Supreme Court's criminal procedural rule concerning the alibi defense in order to decide whether the rule passed constitutional muster. It could not be stretch anyone's imagination to realize a court which issued a body of rules, such as the guidelines in question here, would be unimpressed with an argument challenging the Constitutionality of the court imposed rule. As is the case presented herein, the State's Supreme Court lacked jurisdiction to hear Williams after the district court of appeal had affirmed.

In this current matter before this court, so was Allen Jaffe denied an appeal because the higher court in failing to comply with it own rules, refused to recognize the appellant's corrected order as being Nunc Pro Tunc, the consequence being the court invalidated the order based on improper jurisdiction, which as a result served to defeat appellant Jaffe's right to appeal.

Additionally, that same failure of the court to follow its own rules permitted the refusal of the lower court judge to sign a properly submitted statement of facts in lieu of transcripts. The lack of which resulted in the statement not being admitted and served to defeat the appellant's right of appeal because the Virginia Supreme Court in denying the petition for appeal ruled that "a transcript or written statement of facts is necessary to determine whether the appellant stated objections with reasonable certainty at the time of the ruling as required by rule 5:25."

Pursuant to the denial of the petition for appeal, Allen V. Jaffe subsequently filed a petition for hearing which was subsequently denied on September 12, 2003.

This court now has jurisdiction under title 28 U.S.C. 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented implicate the following provisions of the United States Constitution:

Amend. XIV

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall bridge the privilege or immunities of citizens of the united states; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(a)

States in pertinent part:

> Final judgements or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the supreme court by writ of certiorari where the validity of a treaty or statute of the united states is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the united states. . . .

Virginia Code 16.1-93

States in pertinent part:

> Every action or other proceeding in a court not of record shall be tried according to the principles of law and equity, and when the same conflict the principles of equity shall prevail. No warrant, motion or other pleading shall be dismissed by reason of a mere defect, irregularity or omission in the proceedings or in the form of the pleadings and enter such orders as may be necessary to correct any such defects, irregularities and omissions, and to bring about a trial of the merits of the controversy and promote substantial justice to all parties. . . .

Virginia Code 8.01-272

States in pertinent part:

> In any civil action, a party may plead as many matters, whether of law or fact, as he shall think necessary. A party may join a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurrence. The court, in its discretion, may order a separate trial for any claim.

Virginia Code 8.01-275

States in pertinent part:

> No action or suit shall abate for want of form when the Motion for Judgement or Bill of Complaint sets forth sufficient matter of substance for the court to proceed upon the merits of the cause. The court shall not regard any defect or imperfection in the pleading, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgement, according to law and the very right of the cause, cannot be given.

Virginia Code 8.01-428(b)

States in pertinent part:

> Clerical mistakes in all judgements or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order.

STATEMENT OF THE CASE

Allen V. Jaffe, pro se, filed a civil action in Henrico Circuit Court on September 13, 2001, styled *Allen V. Jaffe v. Virginia Phototherapy, L.L.C.*, case no. CL01-1543, the single defendant, Virginia Phototherapy, L.L.C., is a Virginia limited liability company, with its place of business at 5700 Old Richmond Avenue, suite E 21, Richmond, Virginia 23226.

The action styled case no. CL01-1543, sought relief against Virginia Phototherapy, L.L.C., for its failure to permanently remove plaintiff's unwanted hair as they advertised and promised. They advertised permanent hair removal using an FDA controlled medical device by the name of "Epilight", which the defendant alleged and advertised was approved and effective for use in permanent hair removal. The action sought recovery for monies paid as well as damages for pain and suffering.

Shortly after filing case no CL01-1543, Allen V. Jaffe discovered that the medical device they had advertised as FDA approved for permanent hair removal, had in fact, *not been approved for the purpose they had advertised and for*

which it was used. The device was illegally advertised and its use was adulterated contrary to regulations of the food and drug administration act. The fact that the device had not been approved for permanent hair removal meant that the device as they used it, could not have produced the results they advertised and promised no matter how many times the treatments were performed, whether 50 or 1,000 times. The FDA as part of its approval, had determined that the device was not capable of producing "permanent hair removal".

Because Virginia Phototherapy, L.L.C., knew or had to know that the Epilight device would not and could not permanently remove the plaintiff's hair and yet they lied and deceived him, intending him to suffer the unnecessary torture of the treatments; and because the plaintiff believed that Virginia Phototherapy, L.L.C. was a health care provider and subject to the Virginia Medical Malpractice Act, the plaintiff was forced to split his claim and filed an additional and separate cause of action for medical malpractice against the single defendant Virginia Phototherapy, L.L.C. styled case no. CL01-2094.

The defendant responded by filing a demurrers and special plea. The plaintiff, pro se, attempted to file cross motions and arguments, but the judge refused to hear those arguments or motions over the Jaffe's objections.

During the motions hearings the judge made it impossible for the plaintiff to correct his pleadings to satisfy any defects in his pleadings because Judge Hammond issued an *order* precluding the plaintiff from filing any future motions to amend his actions if necessary, contrary to the Virginia Code 16.1-93 and 8.01-275. The plaintiff. Allen V. Jaffe timely objected to all those and other improper rulings, but those objections were overruled.

During the proceedings, it is vitally noteworthy to mention that the judge continually chided the plaintiff for not having and attorney, and reminded him that "this is what happens when you represent yourself".

Neither cases were judged on their merits. In the matter of case CL01-1543 defendant argued that the matter was duplicative of CL01-2094. the judge in turn affirmed that argument over plaintiff's objection, contrary to 8.01-272 and 16.1-93 of the Virginia Code, and forced the plaintiff to choose between the two matters (even though the plaintiff had submitted a motion to consolidate and which she denied) *if Jaffe* wanted to proceed with his action.

Basing his reluctant decision on language and affirmations by the defendant that they were health care providers and therefore actionable under the medical malpractice act, the plaintiff chose to proceed with the medical malpractice action styled CL01-2094. following his reluctant election, the matter styled CL01-1543 was dismissed over plaintiff's objections for being duplicative of CL01-2094.

At that point the judge instructed the parties to proceed on CL01-2094 and to set a trial date and proceed to establish pre-trial procedures. The trial date was set for October of 2002 and the pre-trial procedures were initiated.

Shortly after the trial date was set, the defendant then filed a demurrer and special plea seeking dismissal on grounds that Virginia Phototherapy, L.L.C. was not a health care provider under the Medical Malpractice Act, and Jaffe was not a patient of Virginia Phototherapy, L.L.C., therefore the company was not actionable under its provisions.

The defendant's pleadings were misleading and consequently, but in spite of the numerous objections of Allen V. Jaffe, the judge dismissed the action for lack of jurisdiction.

Following dismissal of the medical malpractice cause of action for lack of jurisdiction, Jaffe, subsequently, under the proper jurisdiction filed the personal injury cause of action styled CL02-1730, against Virginia Phototherapy, L.L.C., which is this matter appealed.

Simultaneously, the appellant Allen Jaffe, filed a medical malpractice action against the Virginia licensed physician Dr. Ronald Mark Landess, DPM, as the designated physician in charge and personally responsible for performing the Epilight treatments as stipulated in the patient doctor consent form signed by Jaffe.

While the matters of CL01-1543 and CL01-2094, were presided on by Judge Hammond, those cases were not decided on their merits in particular CL01-1543 was dismissed as a result of the judge's bias and prejudice contrary to the code of Virginia statutes 8.01-272, 8.01-275 and 16.1-93; and CL01-2094 was dismissed because the court ruled the lack of jurisdiction regarding the application of the medical malpractice act to a non-healthcare provider, yet the defendant seeks to use those dismissals as bars to deny Allen v. Jaffe his right to justice under the constitution.

As a result of the improper rulings, the plaintiff filed a written complaint against Judge Hammond with the judiciary committee, but was told there was nothing they could do.

Plaintiff's current matter which is the subject of this appeal, styled CL02-1730 against Virginia Phototherapy,

L.L.C., is for numerous torts actionable under the theories of personal injury and product liability. The previous matters CL01-1543 and CL01-2094 are not duplicative of CL02-1730, nor were they properly adjudicated and may not serve as bars under the Doctrine Of Res Judicata.

In response to case no. CL02-1730, the matter now under appeal, the defense filed numerous pleas and motions, among which was a special plea of Res Judicata.

In response to defense motions and pleas, plaintiff filed a motion to strike the special pleas ; and, upon discovering that Judge Hammond had been assigned to the matter styled CL02-1730, plaintiff Allen V. Jaffe also *filed a motion to disqualify Judge Hammond for prejudice and bias.*

A motions hearing was held on January 24, 2003, and during the motions hearing which *lasted approximately 15 minutes*, the judge after careful consideration, *granted the plaintiff's motion to disqualify and she recused herself from cases CL02-1729 and CL02-1730.* then without reason, over the plaintiff's most vocal objections, *continued to preside over those same matters over which she had recused herself.*

The judge, after recusal, and without the presentation of evidence or testimony, prejudicially sustained the defendant's special plea of Res Judicata and dismissed the action styled CL02-1730, once again, over the plaintiff's objections. The judge then continued with additional improper rulings as follows:

(a) Denied all parties motions for sanctions.

(b) In action CL02-1729, denied defendant's plea of privity.

(c) Upon suggestion by the defendant as to the appropriateness of rendering decisions after her recusal, the judge withdrew her previous order denying defendants plea of privity in CL02-1729 and ordered that the matter be remanded for hearing by another judge.

Once again plaintiff noted his objections to the rulings, and relying on the improprieties and error of the judge's post recusal adjudications, stated his intention to appeal.

Based upon the oral rulings of judge Hammond during the motions hearing and believing that the order would accurately reflect and memorialize them, the plaintiff filed his Notice of Appeal to the Supreme Court of Virginia on February 7, 2003.

The plaintiff was never sent a copy of the final order which was prepared by the defendant counsel and submitted to the judge for signing. Consequently the plaintiff Allen V. Jaffe was never provided an opportunity to see, review and challenge the order within the 21 days permitted by the court rules. Unfortunately it was not until after the 21 days that the plaintiff managed to get a copy of the signed order by going to the Henrico County Courthouse and paying a $3.00 fee.

When the appellant Allen Jaffe examined the order, he discovered that the judge's most crucial ruling granting Allen Jaffe's motion to disqualify was deliberately omitted as well as other portions of her rulings. In order to correct the order back to the date of the ruling, appellant Allen Jaffe filed a motion to correct Nunc Pro Tunc, and also provided a sketch order designating the corrections. Thereafter, a motions hearing on plaintiff's motion to correct Nunc Pro Tunc was noticed for April 4, 2003.

The defendant during the hearing on April 4, 2003, on Jaffe's motion to correct Nunc Pro Tunc, although being fully aware that the order they submitted was incorrect and fraudulent, objected to any changes to correct or modify the improper order citing the 21 day rule. The judge as outlined in her order dated April 29, 2003, overruled the defendant's objection and even chided the defense counsel for the failure to provide a copy of the order to the appellant and the failure to certify that such a copy was sent to the plaintiff. The judge chastised the defense and went on to point out that the order as they had prepared it was grossly incorrect in that the submitted order omitted most of her rulings. The judge then she granted the plaintiff's motion to correct the order Nunc Pro Tunc and subsequently wrote the correct order to reflect her true rulings and intentions in the matter.

The judge drafted and signed her own order granting the motion to correct Nunc Pro Tunc, but the order was captioned final order rather than Nunc Pro Tunc and included the judges refusal to sign the presented statement of facts in lieu of transcripts. The mistake in the caption of the order created a timeline jurisdictional issue which served to defeat the appellant's right of appeal.

The petition for appeal was filed on April 21, 2003 and according the Virginia Supreme Court order dated June 25th 2003, it appears the petition was denied because the court did not recognize the order Nunc Pro Tunc correcting the order issued January 24, 2003; the confusion of which was created by the defendants initially submitted fraudulent order. It also appears that the denial was based on the lack of a statement of facts by the defendant which was the result of the lower court judge's refusal to sign or amend and sign the statement of facts which was properly submitted by plaintiff.

In response to the dismissal, the appellant filed a petition for rehearing and addressed those issues on which the Supreme Court appeared to have based their dismissal; however, the Petition For Rehearing was also denied and as prescribed by law, the matter was noticed for appeal to this the Supreme Court of the United Stated under a Special Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. In order to sustain a plea of Res Judicata, the party asserting the defense must present evidence and witnesses to support by a preponderance of the evidence those assertions. Absent such evidence that party may not prevail to defeat the other parties right to a fair and impartial hearing on the merits of the action as guaranteed under the 14th amendment.

The proponent of Res Judicata has the burden of proving by a preponderance of the evidence that an issue was previously raised and decided in an appropriate court in a prior cause of action.

The defender of Res Judicata must prove by a preponderance of the evidence the following: (1) the identity of the things sued for; (2) the identity of the causes of action; (3) the identity of the persons and parties to the actions; and (4) the identity of the quality in the persons for or against whom the claim is made.

It has long been established that the above four elements must be present before Res Judicata can be asserted to bar a subsequent proceeding, *Wright v. Castles*, 232 Va. 218, 222, 349, S.E.2d 125, 128 (1986); *Mowry v. City of Virginia Beach*,

198 Va. 205, 211, 93 S.E.2d 323, 327 (1956); *Highsmith v. Commonwealth*, 25 Va. App. at 440, 489 S.E.2d at 241; *Wright v. Castles*, 232, 349 S.E.2d at 128.

While the admissions in the pleadings or the stipulation of counsel may dispense with the necessity of the entire record in certain cases, generally only an inspection of the entire record in the previous action will disclose whether the identities in controversy in the pending suit was settled between the parties.

In the present case it is difficult to see how it can be determined except from the complete record of the former proceedings whether the defendant was improperly named and whether the plaintiff's individual rights under personal injury had been actually litigated and decided. 50 C.J. S., Judgements, sec. 771, pp. 300, 301; 30 Am Jur., Judgements, sec. 224, pp. 956,957.

The basis of this principle is that the conclusiveness of the prior adjudications upon the issue sought to be retried depends not upon whether the judgement was subject to review, *but upon whether it was a final determination by a court, which had jurisdiction of the subject matter and of the parties, of the identical issue and between the same parties before the court in the subsequent litigation. Johnson Steel Street Rail Co. v. William Wharton, Jr., & Co.*, 152 U.S. 252, 261, 14 S. Ct. 608, 38 L. Ed. 429.

The plaintiff/appellant holds that the judge in the previous matters erred in sustaining Res Judicata and dismissing the action because no evidence at all was presented during the 15 minute hearing that would in any way support any assertion of Res Judicata. No evidence was

introduced or allowed to prove that the matters were decided with finality by a court which had jurisdiction of the subject matter of the parties, the identity of the remedies sought, the identity of the causes of action, or identity of the quality of the persons for or against.

2. A judge may not in a present matter take judicial notice of the records in previous actions and dispense with the necessity of proof of the content of the records of those previous actions even though the same judge may have presided over those previous actions.

The general rule is that the court will not travel outside the record of the case before it in order to take notice of the proceedings in another case, even between the same parties and in the same court, unless the proceedings are put into evidence. The reason for the rule is that the decision of a case must depend upon the evidence introduced, if the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case at hand, conclusive against the opposing party, while if they had been properly introduced they might have been met and overcome.

Regardless of the fact that previous actions were presided over by the same judge in the same court, a plea of Res Judicata does not permit the judge to dispense with the necessity of proof of record in the previous actions. To sustain a claim of Res Judicata, the court will not take notice judicial of the record in the first suits (30 Am Jur., Judgements, Sec. 273, p. 993; 50 C.J.S., Judgements, sec. 836, p. 404.) it is appropriate to point out that ordinarily to sustain the allegation of Res Judicata, the whole record of the former proceedings must be put in evidence (*See* Freeman on

Judgements. 5th Ed., Sec. 1030. pp. 2147, 2148; Jones' commentaries on evidence, 2d Ed., Sec. 1886, p. 3514; 30 Am Jur., Judgements, sec., 274, p. 993; 50 C.J.S., Judgements, Sec. 843-c, p. 417). Generally, only an inspection of the entire record in the first actions will disclose whether the identical issues in the controversies in the pending suit was settled in the previous litigations. Generally a court must review the entire record of the previous case to determine whether the judgement is Res Judicata (*DeCancino v. Eastern Airlines, Inc.*, 283 S.2d 97 (Fla. 1973)).

The fact that the adjudication relied upon by the appellee was made by the same judge who then sustained the plea of Res Judicata is not sufficient. Individual and extrajudicial knowledge on the part of the judge will not dispense with the proof of the facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record. The consideration of facts outside of and not made part of the record is improper. *Newton v. Newton*, 202 Va. 96, 116 S.E.2d 94 (1960); *Darnell v. Barker*, 179 Va. 86, 18 S.E.2d 271 (1942).

Nevertheless, Virginia Phototherapy, L.L.C., the defendant/ appellee sought in the case under review to rely affirmatively upon the facts which were allegedly determined in the prior proceedings brought by it against this appellant Allen V. Jaffe. Virginia Phototherapy, L.L.C., alleged those prior determinations as bars to appellant's motion for judgement although Virginia Phototherapy, L.L.C. neither filed the record as an exhibit with its plea, nor offered it in evidence at the January 24, 2003 motions hearing. Such failure to do so is fatal for "whether the former adjudication is affirmatively or defensively asserted, the record of the prior action must be offered in evidence". Burk's pleading and practice, § 357 at 675 (4th ed. 1952).

During the motion hearing on January 24, 2003, no proof of the whole records of the previous actions on which the plea of Res Judicata was relied upon, were put into evidence for inspection in order to support any claims of identity of issues in controversy which were alleged to have been settled in the previous litigations. Without those records in evidence to inspect and compare, the judge was not permitted to dispense with the necessity of the proof of those whole records in those previous actions. Lacking the introduction of such proof, the defendant failed to satisfy the evidentiary requirements necessary to sustain the plea of Res Judicata; and for those reasons the trial court erred in sustaining the plea of Res Judicata and dismissing the action now under appeal.

The brief time period of 15 minutes in which all the motions were heard demonstrates how summarily the Henrico County Circuit Court treated plaintiff's arguments and shows how his constitutional claims and his right to a fair hearing were not seriously considered.

Without the introduction of the records of the prior cases into evidence, the burden of proof was not met and therefore the plea of Res Judicata should not have been sustained and accordingly, the action of the lower court should be reversed and the matter being appealed should be remanded with direction that it be reinstated on the docket of the original court for trial on its merits.

3. The defender of Res Judicata must prove by a preponderance of the evidence the following: (1) the identity of the things sued for; (2) the identity of the causes of action; (3) the identity of the persons and parties to the actions; and (4) the identity of the quality in the persons for or against whom the claim is made.

It has long been established that the above four elements must be present before Res Judicata can be asserted to bar a subsequent proceeding, *Wright v. Castles*, 232 Va. 218, 222, 349, S.E.2d 125, 128 (1986); *Mowry v. City of Virginia Beach*, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956); *Highsmith v. Commonwealth*, 25 Va. App. at 440, 489 S.E.2d at 241; *Wright v. Castles*, 232, 349 S.E.2d at 128.

The judge erred in applying the doctrine and dismissing the action because no proof of any of the required identities in the previous actions, asserted as bars, were ever presented and entered that would support any claims asserted.

4. A matter dismissed for lack of jurisdiction under the Virginia Medical Malpractice act may not serve as a bar to the assertion of future actions under the proper jurisdiction.

During all times relevant to the filing of the action which was dismissed for lack of jurisdiction, the plaintiff believed that the defendant/appellee Virginia Phototherapy, L.L.C. was a healthcare provider governed by the Virginia Medical Malpractice Act and as such filed the action against the single defendant Virginia Phototherapy, L.L.C. It is well settled that the pursuit of a remedy which a party may think himself entitled to, but to which it develops he is not, does not bar the bringing of a suit on the remedy which does exist. *Northern Assurance Co. v. Grand View Building*, 203 U.S. 106; *Bierce v. Hutchins*, 205 U.S. 341; *Southern Pacific Co. v. Bogert*, 250 U.S. 483; *Bistline v. United States*, 229 Fed. 546.

In the Bistline rule when the united states filed its bill in equity to secure the cancellation of the patents, it was met with a plea by the defendants that the suit was barred because

not brought within six years from the date the patents were issued. The government asserted that the suit was not barred because it was brought within six years after it had received notice of fraud. The case went to trial and the court held the suit barred because the united states had notice of the fraud more than six years before suit was filed. It therefore dismissed the bill on that ground. It was very clear therefore, that when the suit in equity was filed the united states did not have a right to the remedy therein sought, namely, the cancellation of the patents. Hence its course in pursing that supposed remedy does not bar the prosecution of the present suit at law to recover the value of the land.

It is no answer to that proposition to say that when the suit was brought the facts respecting notice were known, or, to be exact, that knowledge was chargeable to the united states. Granting that they were known, whether those facts constituted such notice as would operate to set the statute of limitations in motion was a question of law, and because the United States thought the statute not applicable, would not mitigate against the prosecution of the present suit, its mistake being due to an erroneous view of the law.

The law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate action, upon which recovery could not be had. *McLaughlin v. Austin*, 104 Mich. 489, 491. If the rule were otherwise, a mere mistake of judgement would result in depriving one of valuable rights. *Agar v. Winslow*, 123 Cal. 587. The instant case resembles *Bistine v. United States*, 229 Fed. 546. *See Tullos v. Mayfield*, 198 S.W. 1073; *Stone v. Robinson*, 218 S.W. 5.

The fact that the defendant was not actionable under the Virginia Medical Malpractice act and therefore dismissed, the action being dismissed merely barred the remedy but did not extinguish the right of Allen V. Jaffe to recover for his injuries

Again, the fact that Allen V. Jaffe pursued his action under medical malpractice when met with the plea in bar, does not make the Judgement Res Judicata in the instant suit, for the sole question decided there was the applicability of the Virginia Medical Malpractice Act. That was no adjudication of the rights of Allen V. Jaffe but only of the availability of the remedy. The Virginia Medical Malpractice Act affects the remedy, not the merits. *Townsend v. Jemison*, 9 How. 406; *Mcelmoyle v. Cohen*, 13 pet. 312. *A judgment not on the merits is not Res Judicata. Cromwell v. County of Sac*, 94 U.S. 351.

5. A lower court judge upon recusal pursuant to a motion to disqualify for bias and prejudice may not be able to affect the determinations of those actions from which disqualification and recusal have been granted.

As a general matter, the courts have almost uniformly held that a trial judge who has recused herself "should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge." *El Fendix de Puerto Rico v. The M/Y Johanny*, 36 F.3d 136 at 141 (1st Cir. 1994). 13a Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3550, at 629 (2d 1984); *see also Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988); *Arnold v. Eastern Airlines, Inc.*, 712 f. 2d 899, 904 (4th Cir. 1983); *In Re Cement Antitrust Litigation*, 673 F.2d 1020, 1025 (9th Cir. 1982); *Rohrbach v. AT&T*

Nassau Nassau Metals Corp., 915 F. Supp. 712, & N.5 (M.D. Pa. 1996); *Whitehead v. Nevada Commission on Judicial Procedure*, 920 P. 2d 491, 502-03 (Nev. 1996).

Surely it would be improper for a judge to decide the issues of a case in which he or she had recused themselves if this decision violated the litigant's constitutional right to be heard by a neutral and detached judge or it undermined the publics confidence in the impartiality of the judicial process. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S.. 847, 858 N.7 & 861, 108 S. Ct. 2194, 2201 N.7. 100 L. Ed. 2d 855 (1988) (noting that a judge is called upon to take the steps necessary to maintain public confidence in the impartiality of the judiciary); *Ward v. Monroeville*, 409 U.S. 57, 62, 93 S. Ct. 80, 84, 34 L. Ed. 2d 267 (1972) (stating that due process guarantees litigants a neutral and detached judge.)

As a consequence it was error for the judge to have affected the outcome of this matter under appeal by sustaining the plea of Res Judicata and dismissing the action. In light of the foregoing, the appellant was denied his right to equal protection and a fair trial.

6. On a petition for appeal from a circuit court motions hearing, absent a transcript, the appellate court should consider an appellant's statement of facts when all the requirement for admission have been satisfied, but for the judge's refusal to sign or amend and sign the statement for admission.

The admission of the statement of facts is necessary to an accurate and complete history of the proceedings in the trial court and the appellant should not be made to suffer for the faults of the court.

The appellant Allen V. Jaffe complied with rule 5a:8(c) and (d) which state that a written statement becomes a part of the record when: (1) it is filed in the office of the clerk of the trial within fifty-five (55) days after entry of judgement, to which the appellant Allen V. Jaffe complied; (2) a copy of the statement is mailed or delivered to opposing counsel along with a notice that the statement will be presented to the trial judge within the specified time period to which the appellant also complied; (3) the trial judge signs the statement and the signed statement is filed in the office of the clerk. The judge however, refused to sign or offer to amend and sign the statement.

In *Eugene H. Proctor, Jr. v. Town of Colonial Beach*, 425 S.E.2d 818, 15 Va. App. 608, Va. 0734 it was held that the

> requirement does not provide a means by which the trial judge, through design, inattention or inadvertence, may thwart an appeal by neglecting or refusing to sign the statement of facts. For these reasons, we hold that, once the appellant has complied with the first two elements of rule 5a:8(c), he or she has established prima facie compliance with the requirements of the rule. Thereafter, the trial judge must sign the statement, correct the statement and sign the corrected statement, or, in cases where the judge cannot in good faith recall or accurately reconstruct the relevant proceedings, order a new trial. This court will not dismiss an appeal where an appellant has established prima facie compliance with rule 5a:8(c)(1). rather, in such situations, we will remand the case to the trial judge for appropriate action as required by rule 5a:8(c)(2) or (d).

In this case, just as in Proctor, Allen V. Jaffe, the appellant established prima facie compliance, and there is nothing in the record to explain or justify why the trial judge did not comply with the requirements of rule 5a:8(c)(2) or (d) by signing the statement of facts or signing it after it was corrected to accurately recite the facts and procedural history of the case. Therefore, this court should have remanded this case to the trial court with instructions to the trial judge to sign the statement, correct the statement as needed and sign the corrected statement, or order a new trial if the judge is unable accurately to recall or reconstruct the relevant proceedings. To deny the petition for appeal because the judge thwarted the appellant's efforts to enter his statement of facts would be to grossly deny the appellant his Constitutional right under the 14th amendment to a fair and equitable hearing on the merits of his cause.

The decision of the higher court to not properly deal with the admissibility of the statement of facts has a particularly debilitating effect on an individuals right of appeal. In effect, by failing to ensure the admission of statement of facts when submission requirements are met prima facie met, then those individuals who do not engage a court reporter, even for a brief motions hearing, will find their right to appeal will be denied for lack of a transcript setting down the events of the hearing appealed from.

7. A lower court has no jurisdiction to issue final orders in a matter once that matter has been noticed foe appeal; except that an incorrect or fraudulent order may be corrected at any time by a motion and order to correct nunc pro tunc to the original date of the corrected order.

The judge while prohibited from issuing any final orders related to a matter noticed for appeal, was within her jurisdiction to correct Nunc Pro Tunc, the fraudulently prepared and erroneous order submitted by the defendant's counsel by order Nunc Pro Tunc to the date when the order was originally issued and signed.

In *Cutshaw v. Cutshaw*, 220 Va. 638, 261 S.E.2d 52 (1979) it was held that an attorney's failure to prepare an order for entry by the court, deemed to be an oversight, could be corrected by a Nunc Pro Tunc order. Code § 8.01-428(b) authorizes a trial court to correct "clerical mistakes in all judgements or other parts of the record and errors therein arising from the oversight or from the inadvertent omission." By a Nunc Pro Tunc order, *see Lamb v. Commonwealth*, 222 Va. 161, 279 S.E.2d 389 (1981); *Council v. Commonwealth*, 198 Va. 288, 94 S.E.2d 245 (1956).

The Supreme Court of Virginia "has adopted the majority view that the trial court has the inherent power, independent of statutory authority, to correct errors in the record so as to cause its acts and proceedings to be set forth correctly." In short, the court has the inherent power, independent of statute, upon any competent evidence, to make the record "speak the truth", *Netzer v. Reynolds*, 231 Va. 444, 449, 345 S.E.2d 291, 294 (1986).

When acting Nunc Pro Tunc, the court does not require jurisdiction over the case, *see Dixon v. Pugh*, 244 Va. 539, 543, 423 S.E.2d 169, 171 (1992), rather, the trial court merely corrects the record by entry of an order Nunc Pro Tunc, under the accepted fiction that the order relates back to the dare of the original action of the court "now for then".

The Supreme Court of Virginia improperly rejected the relevance of equal protection principles in denying legitimacy of the appellant's motion and order to correct Nunc Pro Tunc and in so doing served to defeat his right of appeal.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted. And this matter returned to the lower court for trial on the merits of the cause.

Respectfully submitted,

ALLEN V. JAFFE, *pro se*
3211 Fox Chase Drive
Midlothian, VA 23112
(804) 744-8381

APPENDIX A — ORDER OF THE SUPREME COURT OF VIRGINIA, CITY OF RICHMOND DENYING PETITION FOR APPEAL DATED JUNE 25, 2003

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 25th day of June, 2003.

Record No. 030874

Circuit Court No. CL02-1730-00

Allen V. Jaffe,

Appellant,

against

Virginia Phototherapy, L.L.C.,

Appellee.

From the Circuit Court of Henrico County

Upon review of the record in this case and consideration of the amended petition for appeal and the brief in opposition, the Court is of opinion the petition for appeal should be dismissed under Rule 5:11 (c). In part, the appellee states in the brief in opposition, "[T]he arguments being asserted as error in the Petition for Appeal were not raised below." Therefore, a transcript or written statement of facts is necessary to determine whether the appellant stated

objections with reasonable certainty at the time of the ruling as required by Rule 5:25.

On May 22, 2003, the appellee filed a motion to dismiss the petition for appeal in this Court. Because the Court dismisses the petition for appeal under Rule 5:11(c), the motion to dismiss is moot.

On May 28, 2003, the appellant filed a motion to exclude the appellee's brief in opposition. On further consideration whereof, the Court denies the motion.

Furthermore, the record indicates that the circuit court entered an order, dated January 24, 2003, dismissing the case with prejudice. The appellant filed a notice of appeal in the circuit court on February 7, 2003, and a petition for appeal in this Court on April 21, 2003. Therefore, the appeal was docketed in this Court, and the circuit court was without jurisdiction to enter the order dated April 29, 2003. See Code § 8.01-428(13).

For the reasons stated above, the petition for appeal is dismissed.

A Copy,

Teste:

David B. Beach, Clerk

By: s/ [illegible]
Deputy Clerk

APPENDIX B — FINAL ORDER OF THE CIRCUIT COURT OF THE COUNTY OF HENRICO DATED APRIL 29, 2003

VIRGINIA:

IN THE CIRCUIT COURT OF THE
COUNTY OF HENRICO

CASE NUMBER CL02-1730-00

ALLEN V. JAFFE,

PLAINTIFF,

V.

VIRGINIA PHOTOTHERAPY, L.L.C.,

DEFENDANT.

FINAL ORDER

On April 4, 2003, came the plaintiff, pro se, and the defendant, by counsel, on the papers formerly read and on cross-motions, and the case was argued. Whereupon it is

ORDERED that

No Statement of Facts is certified because this case was dismissed with prejudice on a special plea of *res judicata*.

The Order entered January 24, 2003 is amended, over defendant's objection that twenty-one days have expired.

Appendix B

The Order is amended to provide that plaintiff's Motion for Recusal was granted; accordingly Case Number CL02-1729-00 was transferred to another Judge of this Court. The amendment is ordered because the Order entered January 24, 2003 was prepared by the defendant, did not include the Court's oral ruling granting the Motion for Recusal, was not endorsed by plaintiff, and did not provide for the Clerk to sent a copy of the Order to plaintiff, who, in fact did not receive the Order within the twenty-one days of its entry. Accordingly plaintiffs Motion to Reconsider was timely filed. Rule 1:9.

The Clerk is directed to forward a copy of this Order to the plaintiff, Allen V. Jaffe, 3211 Fox Chase Drive, Midlothian, Virginia 23112, and to Lisa Goodwin, Esquire, counsel for the defendant at Hirschler Fleischer, Post Office Box 500, Richmond, Virginia 23218-0500.

ENTER: APRIL 29, 2003

s/ [illegible]
Judge

APPENDIX C — ORDER OF THE CIRCUIT COURT FOR THE COUTY OF HENRICO DATED JANUARY 24, 2003

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF HENRICO

Case No. CL02-1730

ALLEN V. JAFFE,

Plaintiff.

v.

VIRGINIA PHOTOTHERAPY, L.L.C.,

Defendant.

ORDER

This day came the parties and argued the Special Plea and Motion for Sanctions filed by defendant Virginia PhotoTherapy, L.L.C., in this matter;

It appearing to the Court that the Order entered on April 9, 2001 dismissing the matter styled *Jaffe v. Virginia PhotoTherapy, L.L.C.*, No. CL01-1543, dismissed with prejudice any claims for breach of contract, breach of warranty or for fraud; and the Order entered on August 8, 2002 dismissing the matter styled *Jaffe v. Virginia Photo-Therapy, L.L.C.*, No. CL01-2094, dismissed with prejudice the claim for medical malpractice, and

Appendix C

It appearing to the Court that the Motion for Judgment herein is barred by the doctrine of *res judicata* because it is based on identical facts, states identical claims and/or claims that could have been raised in the prior cases, is by and against identical parties, and seeks monetary damages;

It is hereby ORDERED that defendant's Special Plea be sustained and that this action be dismissed, said dismissal to be with prejudice.

It is hereby ORDERED that defendant's Motion for Sanctions be denied.

ENTER: 1/24/03

s/ [illegible]
JUDGE

APPENDIX D — ORDER OF THE SUPREME COURT OF VIRGINIA DENYING PETITION FOR REHEARING DATED SEPTEMBER 12, 2003

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of September, 2003.

Record No. 030874

Circuit Court No. CL02-1730-00

Allen V. Jaffe,

Appellant,

against

Virginia Phototherapy, L.L.C.,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 25th day of June, 2003 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:

s/ [illegible]
Clerk

FILED
JAN 14 2004
OFFICE OF THE CLERK

No. 03-868

In The Supreme Court of the United States

ALLEN V. JAFFE,

Petitioner,

v.

VIRGINIA PHOTOTHERAPY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John R. Walk (VSB No. 19697)
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TABLE OF CONTENTS

Page No.

STATEMENT OF THE CASE 1

ARGUMENT 7

I. The Petition Fails to Meet the Court's Jurisdictional Requirements 7

II. The Issues Presented to the Virginia Supreme Court Were Fully and Fairly Adjudicated under State Law 10

III. Petitioner is Raising Claims Not Litigated Below 15

IV. Petitioner's Rights Have Not Been Prejudiced in Any Way 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Page No.

Berean Law Group, PLC v. Cox, 259 Va. 622, 528 S.E.2d 108 (2000) 13

Davis v. Mullins, 251 Va. 141, 466 S.E.2d 90 (1996) 15

Gauss v. Commonwealth, 141 Va. 440, 126 S.E. 1 (1925) 11

Haynes v. Glenn, 197 Va. 746, 91 S.E.2d 433 (1956) 11

Napert v. Napert, 261 Va. 45, 540 S.E.2d 882 (2001) 15

Smith v. Stanway, 242 Va. 286, 410 S.E.2d 610 (1991) 15

Wagner v. Shird, 257 Va. 584, 514 S.E.2d 613 (1999) 13

STATUTES

Page No.

Virginia Code § 8.01-58.1 11

Virginia Code § 8.01-387 10

VIRGINIA SUPREME COURT RULES

Rule 1:1 16

Rule 1:13 14

Rule 5:9 9

Rule 5:17 ..... 8, 16

Rule 5:25 11

TREATISES

Wigmore on Evidence § 2579 11

U.S. SUPREME COURT RULES

Rule 10 ..... 7, 18

Rule 14 ..... 8, 11, 18

Rule 14(g) 7

U. S. CONSTITUTION

14th Amendment 8, 9, 10, 18

OTHER AUTHORITIES

28 U.S.C. § 1257 ..... 7, 18

TABLE OF APPENDICES

Appendix A - April 9, 2002 Order dismissing Case No. CL01-1543

Appendix B - August 8, 2002 Order dismissing Case No. CL01-2094

Appendix C - Complaint filed by Allen V. Jaffe in Case No. CL02-1730

Appendix D - Assignments of Error, Pages 9-11, of Jaffe's Petition for Appeal

Appendix E - October 20, 2003 Final Order in Case No. CL02-1729

Appendix F - November 10, 2003 Order Imposing Sanctions in Case No. CL02-1729

Appendix G - January 7, 2004 Order dismissing Civil Action No. 3:03cv799

Appendix H - January 7, 2004 Order to Show Cause in Civil Action No. 3:03cv799

Respondent Virginia PhotoTherapy, L.L.C.[1] ("Virginia PhotoTherapy") respectfully requests that this Court dismiss the Petition for Writ of Certiorari filed by Allen V. Jaffe ("Jaffe") for failure to meet the jurisdictional requirements of this Court or, in the alternative, to exercise its discretion to deny a Writ of Certiorari for the reasons stated herein.

STATEMENT OF THE CASE

This matter arises from hair removal treatments provided by Virginia PhotoTherapy to Jaffe. Virginia PhotoTherapy employs a device known as the Epilight™ Hair Removal System which uses pulsed light to kill hair follicles at the root. The dead hair falls out and, in most cases, does not grow back. In authorizing these treatments, Jaffe signed a consent form stating: "I acknowledge that no guarantee or assurance has been given by anyone as to the results that may be obtained". Jaffe alleges that the process "did in fact only temporarily remove the hair" and has unleashed seven (7) suits, all filed *pro se*, arising from his dissatisfaction with the results of these treatments.

Jaffe's first suit against Virginia PhotoTherapy, No. CL01-1543, was filed in the Circuit Court of Henrico County on about September 13, 2001. In that suit, Jaffe alleged a variety of claims including breach of contract, breach of warranty, fraud and negligence. Virginia PhotoTherapy filed a Demurrer to Jaffe's

---

[1] Pursuant to Rule 29.6, Virginia PhotoTherapy states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

pleading. While the Demurrer to Jaffe's first lawsuit was pending, Jaffe filed two (2) additional suits against Virginia PhotoTherapy in Henrico Circuit Court. The first was a Bill of Complaint, No. CH01-1438, in which he sought to enjoin Virginia PhotoTherapy from allegedly harming other customers. Virginia PhotoTherapy demurred to Jaffe's equity suit on the basis that Jaffe lacked standing to bring suit on behalf of other customers. By Order dated March 8, 2002, the Court dismissed Jaffe's equity suit for lack of standing. Jaffe also filed a second Motion for Judgment, No. CL01-2094, in which he attempted to assert a malpractice claim. Virginia PhotoTherapy filed a Special Plea to the second Motion for Judgment on the ground that it was duplicative of Jaffe's first lawsuit, No. CL01-1543, which was still pending at the time.

On April 9, 2002, the Circuit Court of Henrico County conducted a hearing on the pending demurrers and pleas in Case Nos. CL01-1543 and CL01-2094. The Court ruled that the two law actions were duplicative, and Jaffe elected to proceed on the later filed action, No. CL01-2094. Accordingly, the Court entered an Order dismissing Jaffe's original action, No. CL01-1543. The Order specifically recited that the dismissal was with prejudice as to Jaffe's claims for breach of contract, breach of warranty and fraud, and that it was without prejudice only as to the malpractice claim asserted in No. CL01-2094. The Court's April 9, 2002 Order in No. CL01-1543 is reproduced in Appendix "A". Jaffe did not note an appeal of that Order. The Henrico Circuit Court also entered an Order in No. CL01-2094, denying Virginia PhotoTherapy's Special Plea on the basis that the case was no longer duplicative after the Court's dismissal of No. CL01-1543. This Order also permitted amendment of Jaffe's Motion for Judgment in No. CL01-2094.

Virginia PhotoTherapy then filed a Demurrer and Special Plea to Jaffe's amended pleading in No. CL01-2094, on the basis that Jaffe had failed to allege that the hair removal procedure had been improperly performed by Virginia PhotoTherapy. The alleged "malpractice" consisted of advertising the process for "permanent hair removal" whereas the Food and Drug Administration ("FDA") had approved the Epilight™ device for "permanent hair reduction." Virginia PhotoTherapy demurred to this allegation on the grounds, *inter alia,* that the FDA only regulates the manufacture and sale of medical devices, not their use by physicians or others. On July 19, 2002, the Circuit Court of Henrico County heard Virginia PhotoTherapy's Demurrer and Special Plea to Jaffe's malpractice claim, No. CL01-2094. The Court agreed with Virginia PhotoTherapy's arguments and dismissed Jaffe's sole remaining claim with prejudice. That Order, dated August 8, 2002, is reproduced in Appendix "B". Jaffe did not seek to appeal this Order.

Undaunted, Jaffe decided to recast his claims in federal court, filing a Complaint in the United States District Court for the Eastern District of Virginia against Virginia PhotoTherapy, Dr. Ronald Landess (sole member and manager of Virginia PhotoTherapy), Allie Thurston (an employee of Virginia PhotoTherapy), Lumenis, Ltd. and Lumenis, Inc. (the manufacturer of the Epilight™ equipment) in Civil Action No. 3:02CV538. On September 24, 2002, the Court dismissed Jaffe's Complaint for lack of subject matter jurisdiction. This decision was not appealed by Jaffe.

Following dismissal of his federal court action, Jaffe filed a pair of additional cases in Henrico Circuit Court. His Motion for Judgment, No. CL02-1730, against Virginia PhotoTherapy was a restatement of

his prior actions previously dismissed with prejudice pursuant to the Orders described above. That pleading (less exhibits) is reproduced in Appendix "C". Jaffe also filed a separate lawsuit, No. CL02-1729, against Dr. Landess. Defendants filed Special Pleas in each of the two cases, asserting that Jaffe's claims were barred by the doctrine of *res judicata*.

A hearing was held in Henrico Circuit Court on January 24, 2003, at which the Court considered defendants' Special Pleas and Jaffe's Motions to Disqualify Circuit Judge Catherine Hammond. At the conclusion of the January 24, 2003 hearing, Judge Hammond held that No. CL02-1730 was clearly barred by *res judicata* and entered an Order dismissing that action. This Order is appended to Jaffe's Petition. Judge Hammond endorsed the Order for Jaffe (erroneously referred to as "defendant") indicating that he was present and objected to entry of the Order. She recused herself from consideration of No. CL02-1729. Accordingly, there was no ruling in that case.

On about February 7, 2003, Jaffe filed a Notice of Appeal to the Supreme Court of Virginia in No. CL02-1730 specifying that he was appealing "the final judgment Order of this Court entered on the 24th day of January, 2003." Jaffe subsequently attempted through various means to have the record amended to reflect that Judge Hammond had recused herself in No. CL02-1730 and then proceeded to grant Virginia PhotoTherapy's dispositive plea. A hearing was held on April 4, 2003, at which time Judge Hammond rejected both Jaffe's proposed Statement of Facts and declined to enter his sketch Corrected Order purporting to correct the foregoing alleged "clerical omissions" in the January 24, 2003 Order. On the same date, April

4, 2003, Judge Hammond entered an Order recusing herself from Case No. CL02-1729.

On April 29, 2003, in response to Jaffe's motions, Judge Hammond entered an amended Final Order which she drafted and signed without endorsement of Jaffe or counsel for Virginia PhotoTherapy. The amended Final Order stated that the January 24, 2003 Order "is amended to provide that plaintiff's Motion for Recusal was granted; accordingly Case No. CL02-1729 was transferred to another Judge of this Court." Notably, that Order did not amend Judge Hammond's prior determination that No. CL02-1730 was dismissed with prejudice on *res judicata* grounds, nor did it make any reference to recusal in No. CL02-1730. The amended Final Order is appended to Jaffe's Petition. No Notice of Appeal was filed following entry of this Order.

On April 28, 2003, Jaffe submitted his Petition for Appeal to the Supreme Court of Virginia in No. CL02-1730. The Assignments of Error which appear at pages 9-11 of Jaffe's Petition for Appeal are reproduced at Appendix "D". The Supreme Court of Virginia declined to grant a Writ of Appeal and dismissed Jaffe's Petition by Order dated June 25, 2003, which is appended to Jaffe's Petition. Jaffe then sought reconsideration of the Court's dismissal of his Petition, and the Supreme Court of Virginia denied Jaffe's request on September 12, 2003. This Order is also appended to Jaffe's Petition.

Case No. CL02-1729, the companion case against Dr. Landess, was reassigned to Judge Gary Hicks of Henrico Circuit Court. On September 17, 2003, Judge Hicks issued a letter opinion in which he ruled that because Dr. Landess was in privity with Virginia

PhotoTherapy, Jaffe's claims against Dr. Landess were barred by *res judicata*. Judge Hicks entered a Final Order dismissing No. CL02-1729, dated October 20, 2003. This Order is reproduced in Appendix "E." Judge Hicks subsequently entered an Order Imposing Sanctions against Jaffe for his unconscionable conduct in connection with that case. That Order is reproduced in Appendix "F." Jaffe has noted an appeal of this Order.

In addition to all of the foregoing, Jaffe has filed a seventh suit arising out of his unsuccessful hair removal treatments. This case, filed in the United States District Court for the Eastern District of Virginia, against Virginia PhotoTherapy, Dr. Landess, their counsel and Judge Hammond, alleges that defendants conspired to deprive Jaffe of his constitutional rights in connection with the above-referenced dismissals of his various suits. On January 7, 2004, United States District Judge Robert Payne dismissed the case for lack of subject matter jurisdiction. He also entered an Order to Show Cause in which he found that "the complaint filed herein is frivolous and interposed for the purpose of vexation and harassment." These Orders are reproduced in Appendices "G" and "H."

For the reasons which follow, this Court should dismiss the Petition for failure to satisfy the Court's jurisdictional requirements and/or exercise its discretion to simply decline to grant a Writ of Certiorari.

ARGUMENT

I. The Petition Fails to Meet the Court's Jurisdictional Requirements.

The jurisdictional requirements of this Court is set forth at 28 U.S.C. § 1257 which provides in pertinent part that the Court will consider:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had ... where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of ... the United States.

Rule 10 of the Rules of the Supreme Court provides that appeals are granted only for "compelling reasons" and not by right. Paragraph (c) explains that appeals may be granted where "a state court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court" or "in a way that conflicts with relevant decisions of this Court." Finally, Rule 14(g) includes among the required contents of a petition a statement of the case, which is specifically required to include the stage where federal questions were raised with citations to the record to show they were timely raised.

As set forth more particularly in the preceding factual statement, this matter arises from hair removal treatments provided by Virginia PhotoTherapy to Jaffe. His Motion for Judgment (Appendix "C") purports to

state eight (8) different claims or causes of action -- First Cause of Action (Negligence); Second Cause of Action (Product Liability); Third Cause of Action (Breach of Implied Warranty); Fourth Cause of Action (Breach of Express Warranty); Fifth Cause of Action (Fraud and Deceit); Seventh Cause of Action (Negligent Misrepresentation); Eighth Cause of Action (Negligent Entrustment); and Ninth Cause of Action (Outrageous Conduct and Gross Negligence)(there is no "Sixth Cause of Action"). All of the foregoing claims and causes of action plainly arise under state law. The decision of the trial court which is being appealed was based upon the state law doctrine of *res judicata*.

Pursuant to Rule 5:17 of the Virginia Supreme Court, a Petition for Appeal must contain specific Assignments of Error setting forth particular matters being appealed. This rule specifically states: "Only errors assigned in the petition for appeal will be noticed by this Court". A review of the Assignments of Error in Jaffe's Petition for Appeal (Appendix "D") fails to reveal any question of federal law framed in Jaffe's appeal to the Virginia Supreme Court. His assignments do not even mention the 14th Amendment, which he identifies in his Petition to this Court as the "important question of federal law" which is being asserted in this appeal.

Nowhere in the Petition does Jaffe purport to satisfy Rule 14's requirement of identifying when this right was asserted below. In fact, the 14th Amendment was briefly mentioned in connection with one (1) of Jaffe's six (6) arguments. Jaffe's initial argument was that Judge Hammond, the trial judge who dismissed Nos. CL01-1543 and CL01-2094, was biased and, thus, these rulings should not have been considered in ruling on Virginia PhotoTherapy's Special Plea in the subject action. No factual or legal support is offered for this

assertion, other than pointing to her subsequent voluntary recusal in No. CL02-1729. In this regard, at pages 23-4 of the Petition for Appeal, Jaffe states: "she also cosidered [sic] the fact that the plaintiff, petitioner's rights under the due process clause of the 14th Amendment to the Contitution [sic] of these United States, were severely abridged in the previous actions." A similar reference appears at page 25, where Jaffe states: "to allow them [the decisions in CL01-1543 and CL01-2094] to be a bar under *res judicata* would strike a blow against equity in law and the plaintiff's rights under the 14th Ammendment [sic]." See also paragraph 7 of Jaffe's Statement of the Case, page 14, where he asserts that in connection with these prior actions, Nos. CL01-1543 and CL01-2094, "plaintiff was deprived of his civil right to justice and equity under the 14th Amendment." These three references are the only citations to the 14th Amendment in the Petition for Appeal.

The foregoing clearly fails to satisfy this Court's jurisdictional requirements that a right protected under federal law be "specifically set up" and "timely raised." Importantly, in connection with this argument, Jaffe was not asserting any deprivation of constitutional rights in connection with the adjudication of the subject case. Rather, he is arguing that his rights were infringed when prior actions, Nos. CL01-1543 and CL01-2094, were dismissed. Under Virginia procedure, Jaffe had a right to appeal these decisions to the Virginia Supreme Court. However, pursuant to Rule 5:9 of the Rules of the Virginia Supreme Court, a Notice of Appeal must have been filed within thirty (30) days of entry of the Final Order in these cases. His appeal was rejected not under any interpretation of the 14th Amendment by the Virginia Supreme Court which should now be reviewed by this

Court, but simply due to Jaffe's failure to exercise his right of appeal to these decisions as provided by Virginia law.

Moreover, to the extent this Court regards this argument as having presented a federal question to the Virginia Supreme Court, it does not appear to correlate to any of the issues appealed by Jaffe in his Petition to this Court. Accordingly, the Petition should be denied or dismissed for the simple reason that it fails to meet this Court's jurisdictional requirements.

II. The Issues Presented to the Virginia Supreme Court Were Fully and Fairly Adjudicated under State Law.

To the extent this Court wishes to consider the 14th Amendment to have been timely raised below, the Petition fails to make any connection between the 14th Amendment and the alleged errors being appealed. Rather, it is apparent that each of the issues presented to the Virginia Supreme Court was fully and fairly adjudicated under state law.

The gravamen of Jaffe's first three arguments is that the trial judge erred in sustaining a plea of *res judicata* without formally admitting into evidence the entire record of each of the prior proceedings being relied upon. No constitutional basis is asserted in support of these arguments. Rather, the authority cited consists of decisions under state law governing various aspects of a *res judicata* plea. Significantly, there is also compelling authority that a Court may take judicial notice of its own rulings, particularly in prior actions between the same parties. *See, e.g.*, Virginia Code § 8.01-387 ("All courts and officers shall take notice of the signature of any of the judges, or of

the Governor of this Commonwealth, to any judicial or official document"); Wigmore on Evidence § 2579 (noting that judicial notice often taken by trial courts of "the record in the same proceeding or in a prior stage of the same controversy..."); *Haynes v. Glenn*, 197 Va. 746, 752, 91 S.E.2d 433, 437 (1956); *Gauss v. Commonwealth*, 141 Va. 440, 443, 126 S.E. 1, 2 (1925)("That an appellate court will take judicial notice of its own records appears to be well settled").

Jaffe had filed at that point four (4) prior actions, all of which had been dismissed and none of which had been appealed by Jaffe. Two of these decisions, No. CL01-1543 and No. CL01-2094, were on the merits and with prejudice. See Appendices "A" and "B". Both of these decisions were rendered by the same Court and, in fact, by the same trial judge, as rendered the decision being appealed. Notwithstanding this, the judge had before her the files in both of these actions and consulted the files in ruling upon Virginia PhotoTherapy's plea. At no point below did Jaffe object to the failure to admit these files into evidence when such omission could easily have been cured. Similar to Rule 14 of this Court, Rule 5:25 of the Virginia Supreme Court requires as a condition of appealing a ruling that a timely objection be raised so that the trial judge may make an informed ruling. As indicated in the Virginia Supreme Court's Order denying his appeal, this issue was rejected due to Jaffe's own failure to make a timely objection and to preserve a record of same for consideration on appeal.

Similarly, Jaffe's fourth argument asserts that the dismissal of No. CL02-2094 should not bar subsequent assertion of related claims because that decision was rendered under the Virginia Medical Malpractice Act, Virginia Code § 8.01-58.1 *et seq.* Jaffe

ignores the previous dismissal of No. CL01-1543 which was expressly with prejudice to any claim for breach of contract, breach of warranty or for fraud. Thus, all or most of the claims asserted in this action were barred without regard to the Order dismissing No. CL01-2094. The only claim reserved for further adjudication was the malpractice claim asserted in No. CL01-2094, which was also pending at the time. See Appendix "A". Jaffe did not appeal the Final Order in No. CL01-1543. Thus, once the Court had dismissed No. CL01-2094, the only claim reserved in the previous dismissal order, all claims and causes of action were extinguished. See Appendix "B". Importantly, Jaffe failed to appeal the Final Order in No. CL01-2094 as well.

Jaffe's argument also misinterprets the Virginia Medical Malpractice Act. It does not create any new cause of action. Rather, it sets forth a procedural framework for assertion of common law causes of action such as battery or negligence against "health care providers" as defined in the Act. The Demurrer filed by Virginia PhotoTherapy to No. CL01-2094 did include among its bases that hair removal was not a "medical" procedure. Assuming that the Court agreed, however, this argument would not have resulted in dismissal of the action. The dismissal of the action was due to the more fundamental flaw in Jaffe's Motion for Judgment -- the failure to make any effective allegation of negligence or other breach of duty under state law.

The fifth argument centers around the alleged recusal of the trial judge in No. CL02-1730. Here Jaffe has simply misrepresented the facts. A hearing was held jointly in No. CL01-1729, in which Jaffe asserted substantially the same claims against Dr. Landess, and No. CL02-1730 against Virginia PhotoTherapy for consideration of Special Pleas by defendants asserting

res judicata and Motions to Disqualify filed by Jaffe. At that time, the trial judge granted Jaffe's Motion to Disqualify as to No. CL02-1729. An Order correctly reflecting this ruling was entered by the Court on April 4, 2003. As to No. CL02-1730, however, the trial judge ruled that there was no credible argument that the case was not barred by *res judicata*, declined to recuse herself, and granted defendant's Special Plea. This is accurately reflected in an Order presented and entered in Jaffe's presence at the hearing on January 24, 2003.

Jaffe has continued to maintain that the trial judge had recused herself in both cases and then proceeded to rule on the Special Plea in No. CL02-1730. After noting an appeal to the January 24, 2003 Order, he proceeded via various means to attempt to have the record amended to reflect same. The trial judge disagreed, and rejected both this proposed Statement of Facts and his Motion to Correct Clerical Omission in Previous Order. In fact, the trial judge entered an amended Final Order which she prepared on April 29, 2003. This Order recites recusal in No. CL02-1729 only.

It is well established in Virginia that Courts speak through their Orders and that preliminary statements made during the course of argument or otherwise by the Judge are not rulings of the Court unless and until incorporated into a written Order. *See, e.g., Wagner v. Shird*, 257 Va. 584, 514 S.E.2d 613 (1999); *Berean Law Group, PLC v. Cox*, 259 Va. 622, 528 S.E.2d 108 (2000). Thus, Jaffe's fundamental assertion that the January 24, 2003 Order was "fraudulent" because it did not accurately reflect Judge Hammond's rulings is legally impossible. As a matter of law, unless and until modified, vacated or

suspended, the January 24, 2003 Order entered by Judge Hammond was her ruling in the case.

Jaffe's assertion that Judge Hammond recused herself in No. CL02-1730 and then proceeded to sustain Virginia PhotoTherapy's Special Plea is itself a legal *non sequitur*. Jaffe does not question that Judge Hammond sustained the Special Plea in No. CL02-1730 and dismissed this case. By proceeding to rule on the Special Plea in No. CL02-1730, by definition, the Judge was declining to disqualify herself from consideration of the case. Moreover, had Judge Hammond intended to disqualify herself in both cases as contended by Jaffe, she would have entered Jaffe's sketch Corrected Order reciting recusal in No. CL02-1730 when this omission was called to her attention in Jaffe's Motion to Correct Clerical Omission in Previous Order. The only conclusion that can reasonably be drawn is that Judge Hammond intended to sustain the Special Plea as to No. CL02-1730 and to recuse herself from No. CL02-1729, precisely as reflected in her January 24, 2003 and April 4, 2003 Orders.

Judge Hammond's amended Final Order recites as grounds for amendment that the original Order did not provide for the Clerk to send Jaffe a copy and that he did not get a copy within twenty-one days of entry. Neither counsel nor the Court are required to provide litigants with copies of entered Orders. Rather, Rule 1:13 of the Rules of the Virginia Supreme Court provides that sketch Orders be endorsed, presented at a duly noticed hearing or that compliance with the rule be modified or dispensed with by the Court. Under the circumstances of this case where the Order was being entered in open Court, at a duly noticed hearing and in Jaffe's presence, the Judge was clearly acting within her discretion to endorse the Order on Jaffe's behalf,

noting his appearance and objection to her ruling. *Smith v. Stanaway*, 242 Va. 286, 410 S.E.2d 610 (1991); *Davis v. Mullins*, 251 Va. 141, 466 S.E.2d 90 (1996); *Napert v. Napert*, 261 Va. 45, 540 S.E.2d 882 (2001). Once an Order is entered, it is the duty of counsel (or *pro se* party) desiring to appeal to obtain a copy from the Clerk's Office.

Jaffe did not present below and does not present in his Petition, any grounds for disqualification of Judge Hammond. Rather, it is evident that after having suffered dismissal of three (3) previous actions by Judge Hammond, he was simply seeking to try his luck with another judge. As discussed in more detail in Section IV below, however, even this would fail to save his hopelessly flawed claims.

III. Petitioner is Raising Claims Not Litigated Below.

Jaffe's sixth and seventh arguments relate to the trial court's refusal to enter his Statement of Facts and to the fact that the amended Final Order was not entered "*nunc pro tunc*". As explained above, the trial judge found Jaffe's proposed statement inaccurate and refused to enter it. The trial judge similarly rejected the sketch Corrected Order proposed by Jaffe amending the January 24, 2003 Order by reciting that the trial judge had recused herself and then proceeded to grant a dispositive motion. Instead, the trial judge entered an amended Final Order on April 29, 2003, reciting recusal in No. CL02-1729 only and leaving in place her previous dismissal of the action pursuant to Virginia PhotoTherapy's plea of *res judicata*.

Jaffe's appeal to the Virginia Supreme Court was heard pursuant to a Notice of Appeal filed on or about

February 7, 2003 and specifying that the Order being appealed was the January 24, 2003 Order. This Order (and Jaffe's Notice of Appeal) preceded both Jaffe's filing of his proposed Statement of Facts (March 19, 2003) and his Motion to Correct Clerical Omission in Previous Order (March 17, 2003). No Notice of Appeal was filed to the amended Final Order entered on April 29, 2003. Thus, Jaffe has failed to meet even the most basic requirement of appealing the trial court's ruling on these issues.

In fact, Virginia PhotoTherapy filed a Motion to Dismiss on the basis that Jaffe had failed to file a Notice of Appeal to the April 29, 2003 amended Final Order. The Virginia Supreme Court ruled *sua sponte* that the April 29, 2003 Final Order had been entered after expiration of the time permitted by Rule 1:1 of the Rules of the Virginia Supreme Court. Thus, the trial court had lost jurisdiction of the case and the Order was a nullity. (This would have been the case even if the trial judge had entered the Order *nunc pro tunc*). Importantly, had the Virginia Supreme Court ruled otherwise, Jaffe's appeal would have been summarily dismissed for failure to file a timely Notice of Appeal.

Finally, as discussed above, Rule 5:17 of the Virginia Supreme Court requires that any alleged error being appealed be separately identified in Assignments of Error. A review of the Assignments of Error in Jaffe's Petition for Appeal (Appendix "D") will confirm that neither issue was presented to the Virginia Supreme Court.

IV. Petitioner's Rights Have Not Been Prejudiced in Any Way.

At the January 24, 2003 hearing at which Special Pleas were considered by the trial court in No. CL02-1729 and No. CL02-1730, the trial judge granted Jaffe's Motion to Disqualify as to No. CL02-1729. This case was substantially identical to the subject action with the exception that the defendant was Dr. Landess, whereas the defendant in all of the previous actions was Virginia PhotoTherapy. Contrary to federal law and the law of many states, Virginia has long observed a rule requiring mutuality of parties as a condition of asserting collateral estoppel or *res judicata*. However, this rule is tempered by a doctrine permitting the assertion of these pleas by a party who is in privity with a party to the previous action. Accordingly, Dr. Landess asserted his Special Plea as the sole member and manager of Virginia PhotoTherapy. Importantly, the party against whom the plea was asserted -- Jaffe -- was absolutely identical in all actions. Thus, there is no issue as to whether Jaffe was afforded a full and fair opportunity to be heard in the prior actions.

No. CL02-1729 was referred to another judge of the Henrico Circuit Court and Dr. Landess' Special Plea was brought on for hearing on August 22, 2003. In connection with this case, the entire file of all of Jaffe's previous actions was introduced into evidence over Jaffe's objection. Judge Hicks issued his decision by letter dated September 17, 2003, in which he sustained Dr. Landess' plea of *res judicata*. A Final Order (Appendix "E") was entered on October 20, 2003 dismissing the case with prejudice. The plea in this case presented every issue which would have been pertinent to consideration of Virginia PhotoTherapy's plea in No. CL02-1730 plus the additional factor of the

lack of strict mutuality of parties and the necessity of establishing privity. It would be literally impossible for Judge Hicks to have sustained Dr. Landess' plea in No. CL02-1729 and not to have likewise sustained Virginia PhotoTherapy's plea in No. CL02-1730. Thus, notwithstanding all of the arguments presented by Jaffe, the simple fact is that his rights were not prejudiced in any way.

CONCLUSION

This Court should dismiss the appeal as failing to meet the jurisdictional requirements of 28 U.S.C. § 1257 and Rules 10 and 14 of this Court. The Motion for Judgment which initiated this action asserts purely state law claims. On appeal to the Virginia Supreme Court, Jaffe failed to properly frame in his Assignments of Error any constitutional issue. The only citations in his Petition for Appeal to the Virginia Supreme Court to any federal constitutional or statutory right are in support of his first assignment of error in which he asserted that prior adjudications, which he failed to appeal as provided by the Rules of the Virginia Supreme Court, were tainted by bias on the part of the trial judge and should not have been considered in support of Virginia PhotoTherapy's plea of *res judicata*. It is apparent that the Virginia Supreme Court rejected Jaffe's appeal, not under any interpretation of the 14th Amendment, but due to his failure to appeal these prior decisions.

Even if this Court were to disregard the foregoing infirmities in Jaffe's appeal, an analysis of the arguments presented in this Petition confirms that each issue which was argued to the Virginia Supreme Court was correctly decided under state law. The evidentiary requirements for sustaining a plea of *res*

judicata are a matter of state law. The decisions of the Virginia Supreme Court on this subject are conflicting, with some decisions indicating that the entire record in the prior action(s) must be introduced into evidence, and other decisions confirming that a Court may take judicial notice of its own Orders in prior actions, particularly related actions among the parties to the pending action. In any event, there is no constitutional issue presented. Likewise, Jaffe fails to present any constitutional issue as to the Virginia Supreme Court's application of the Virginia Medical Malpractice Act. His arguments related to the alleged recusal of the trial judge are unsupported by the record.

Jaffe's arguments related to the trial judge's refusal to enter his Statement of Facts and entry of the April 29, 2003 amended Final Order were not argued below and are not properly before this Court. The appeal to the Virginia Supreme Court was argued pursuant to a Notice of Appeal filed on or about February 7, 2003 and which specifies that the Order being appealed was the January 24, 2003 Order sustaining Virginia PhotoTherapy's Special Plea. No appeal was noted following entry of the trial court's amended Final Order on April 29, 2003 and Jaffe's Petition for Appeal to the Virginia Supreme Court fails to argue either issue.

Finally, it is apparent from a review of the record that Jaffe's rights have not been prejudiced in any way. Judge Hammond, the trial judge Jaffe falsely accuses of bias, recused herself from consideration of a companion action filed the same day as the subject action. This case presented all issues present here and, in addition, required establishing privity between Virginia PhotoTherapy and Dr. Landess. Another circuit judge, as to whom Jaffe has made no such

allegation, has ruled Jaffe's claims barred by *res judicata* and, in fact, sanctioned Jaffe for frivolous and abusive litigation conduct. For all of the foregoing reasons, this Court should dismiss this appeal and/or exercise its discretion to simply deny a Writ of Certiorari.

Respectfully submitted,

John R. Walk (VSB No. 19697)
HIRSCHLER FLEISCHER
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Richmond, Virginia 23218-0500
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Counsel for Virginia PhotoTherapy, L.L.C.

V I R G I N I A:

IN THE CIRCUIT COURT FOR HENRICO COUNTY

ALLEN VALENTINO JAFFE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	CL01-1543
	)	
VIRGINIA PHOTOTHERAPY, L.L.C.,	)	
	)	
Defendant.	)	

ORDER

This day came the parties and argued the Demurrer filed by defendant Virginia PhotoTherapy, L.L.C.;

It appearing to the Court that the Motion for Judgment herein fails to reasonably apprise defendant of the true nature of plaintiff's claim as required by Rule 1:4(d) of the Rules of the Supreme Court of Virginia; and

It appearing to the Court that plaintiff has filed another action against defendant arising from the same subject matter as this action (No. CL01-2094), and upon the representation by plaintiff that he wishes to proceed on the Amended Motion for

Judgment dated March 1, 2002 tendered to the Clerk in that action;

It is hereby ORDERED that defendant's Demurrer be sustained and that this action be dismissed, said dismissal to be with prejudice to any claims for breach of contract, breach of warranty or for fraud, but without prejudice to plaintiff's right to proceed on the claim for medical malpractice set forth in the Amended Motion for Judgment in Case No. CL01-2094.

ENTER: [April 9, 2002]

[Judge Catherine Hammond]
JUDGE

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

ALLEN VALENTINO JAFFE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	CL01-2094
	)	
VIRGINIA PHOTOTHERAPY, L.L.C.,	)	
	)	
Defendant.	)	

ORDER

This day came the parties and argued the Demurrer and Special Plea filed by defendant Virginia PhotoTherapy, L.L.C. in this matter;

It appearing to the Court that the Motion for Judgment does not state a cause of action and fails to state facts upon which the relief demanded can be granted;

It is hereby ORDERED that defendant's Demurrer be sustained and that this action be dismissed, said dismissal to be with prejudice.

Based on the foregoing, defendant's Special Plea is denied.

The objections of plaintiff, Allen V. Jaffe, to the Court's rulings are hereby noted.

ENTER: [August 8, 2002]

[Judge Catherine Hammond]
JUDGE

VIRGINIA:

IN THE CIRCUIT COURT FOR HENRICO COUNTY

ALLEN V. JAFFE, 3211 Fox Chase Drive Midlothian, Virginia 23112 Plaintiff,	)	
v.	)	Civil Action No. CL02-1730
VIRGINIA PHOTOTHERAPY, L.L.C., A Virginia corporation Libbie Medical Center Suite E-21 5700 Old Richmond Avenue Richmond, VA 23226 Defendant.	)	

COMPLAINT

SERVE: Virginia Phototherapy, L.L.C.
c/o Nancy R. Little, Registered Agent
1 James Center
901 East Cary Street
Richmond, Virginia 23219

Plaintiff, Allen V. Jaffe, pro se, moves for judgement against the defendant Virginia Phototherapy, L.L.C., on the grounds and in the amounts set forth below:

1. This is a civil action for torts commited by the defendant, Virginia Phototherapy, L.L.C., upon the plaintiff, Allen V. Jaffe, pro se, and plaintiff asserts a cause of action for negligence, product liability, breach of express warranty, breach of implied warranty, fraud and deceit, negligent entrustment, and misrepresentation.

2. Defendant, Virginia Phototherapy, L.L.C., is a Virginia based limited liability company, with its principal place of business at 5700 Old Richmond Avenue, Suite 21, Richmond, Virginia, VA. 23226, and has its registered agent, Nancy R. Little, at 1 James Center, 901 East Cary Street, Richmond, VA. 23219, and is generally in the business of what is advertised as performing "painless, permanent hair removal" using the "Epilight Medical Device, and does sustancial business in Richmond, Virginia.

3. Plaintiff, is a resident of Richmond, Virginia.

4. At all times mentined in this Complaint, defendant, Virginia Phototherapy, L.L.C., advertised to the public the medical service of "painless, permanent hair removal" using an FDA controlled Class II medical device named "Epilight".

5. At all times mentioned in this Complaint, defendant provided the facilities, support services and staff necessary for its doctors practice "painless, permanent hair removal".

6. At all times mentioned in this Complaint, defendant employed technicians to assist and work under Dr. Landess, or other physicians in the

accomplishment of painless, permanent hair removal on patients.

FIRST CAUSE OF ACTION

NEGLIGENCE

7. Plaintiff incorporates by reference as if fully set forth all of the allegations contained in the preceding paragraphs.

8. Defendant, acting through its officers, agents, representatives, physicians or other employees, represented, by implication or otherwise, through advertising to the general public, including plaintiff, that the "Epilight Medical Device was safe and FDA approved when used for "permanent painless hair removal".

9. Those representations were reiterated and disseminated on the world wide web and in Virginia, by defendant's officers, agents, representatives, physicians and employees acting within the course and scope of their employment or respective relationship, merchandising and marketing the "Epilight" for permanent painless removal **(See Exhibit #2, Defendant's Advertisement).**

10. Those representations by defendant, acting through its officers, agents, representatives, service providers, physicians and employees, were made with the intent that the general public, including plaintiff, in Virginia and worldwide would rely on them, and were made with knowledge of the falsity of those representations, or with reckless disregard of their truth.

12. In reliance on the truth of those representations, plaintiff during the months of October 2000 through January 2001, underwent "Epilight treatments for permanent hair removal, for the areas of the back, shoulders, arms and hands for the purpose intended, as advertised by defendants. However, defendants representations as to "Epilight's FDA approval and its safety and effectiveness for permanent hair removal, were false and fraudulent **(See Exhibit #3, Letter from the FDA)**, and the "Epilight" for permanent and painless hair removal did in fact only temporarily remove the hair and yet caused plaintiff to sustain painfull injuries which included burning, loss of feeling, numbness, headaches, and chills and fever.

13. Plaintiff, being unaware that the device had not received approval for the use represented and of the dangers, and completely relying on defendant representations, which created both express and implied warranties of use and safety, sustained the injuries while being treated for permanent hair removal in the manner and for the purpose intended by defendant. The dangers inherent in the use of the device were a proximate cause of plaintiff's injuries, and, exept for defendant's false and fraudulent representations as to its FDA approved use and safety, plaintiff would not have allowed the use of the device and sustained those injuries.

SECOND CAUSE OF ACTION

PRODUCT LIABILITY

14. Plaintiff incorporates by reference as if fully set forth all of the allegations contained in the preceding paragraphs.

15. Defendants negligently advertised, marketed, and treated patients using the "Epilight Hair Removal Medical Device" for the purpose of permanent hair removal.

16. The "Epilight Hair Removal System Medical Device", was used on the plaintiff for permanent painless hair removal through the ordinary course of their business in an unreasonably dangerous and defective condition.

17. Plaintiff expected the "Epilight Hair Removal Medical Device" when used for permanent hair removal to be performed on the plaintiff without substantial change in the intended use when performed on the plaintiff. The "Epilight Hair Removal Medical Device was, in fact, used to perform permanent hair removal on the plaintiff, and was used with substantial change in its intended **(See Exhibit #3, Letter from the FDA).** But for the adulteration of the Epilight by representations, the plaintiff would not have unergone the treatments and would not have suffered injuries.

18. The injuries sustained by plaintiff were caused by the unreasonable dangerous and defective

condition and use of "Epilight Hair Removal Medical Device" for permanent hair removal.

THIRD CAUSE OF ACTION

BREACH OF IMPLIED WARRANTY

19. Plaintiff incorporates by reference as if fully set forth all of the allegations contained in the preceding paragraphs.

20. Plaintiff Allen V. Jaffe, was at the time unskilled in the research, design, manufacture and intended uses of the "Epilight Hair Removal Medical Device" and relied entirely on the skill, judgement and representations of the defendant when permitting hair removal using the "Epilight Hair Removal Medical Device". The defendant, by and through its agents, physicians and employees, advertised and represented that the "Epilight device was safe and fit for the purposes of permanent hair removal that they intended and for which they treated the plaintiff.

21. Pursuant to 8.2-315 of the Va. Code, unless excluded or modified, an implied warranty that the goods shall be fit for a particular purpose arises where the seller, at the time of the contracting, has reason to know any particular purpose for which the good are required and that the buyer is relying on the seller's skill or judgement to select or furnish suitable goods.

22. In this action, defendant had reason to know the exact purpose for which the plaintiff required his

services, namely "**painless and permanent hair removal**" In addition, the defendant had reason to know the buyer was relying on the seller's skill or judgement to furnish appropriate service; and lastly, that the plaintiff in fact relied upon the defendants' skill or judgement.

23. At the time and place of hair removal, plaintiff relied on defendants' implied warranties..but, in fact, the "Epilight Hair Removal Medical Device" was unsafe and unfit for such purpose; and as a result of the breach, plaintiff was caused injuries.

FOURTH CAUSE OF ACTION

BREACH OF EXPRESS WARRANTY

24. Plaintiff incorporates by reference as if fully set forth all of the allegations contained in the preceeding paragraphs.

25. Defendant advertised, marketed, and sold the "Epilight Hair Removal" which was being used for permanent hair removal. Defendant knew that the "Epilight Hair Removal Device" was being used for permanent hair removal and expressly warranted that the "Epilight Hair Removal Device" was FDA approved, safe and fit for the described use of permanent hair removal. In advertisements defendant affirmed by fact, by promises and by descriptions made that the "Epilight" operated by a doctor (at the of **$800.00 per hour**) **(See Exhibit 1, Consent Form)** would painlessly and permanently remove the plaintiff's unwanted hair in only 4-6 treatment sessions **(See Exhibit 2, Defendant's Advertisement),** which became part of the basis of

the bargain. Those photos and ads which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model. (Va. Code 8.2-313 (1991).

26. Plaintiff, ignorant of the misrepresentations by the defendant, permitted the use of the "Epilight" based on the defendants' express warranties, and in reliance was caused to suffer injuries.

FIFTH CAUSE OF ACTION

FRAUD AND DECEIT

27. Plaintiff incorporates by reference as if fully set forth all of the allegations contained in the preceding paragraphs.

28. At all times material, defendant falsely and fraudulently misrepresented to the public at large that the "Epilight Hair Removal System" was safe and fit for hair removal as advertised. Defendant did fraudulently and deceitfully engaged in misrepresentations, false advertising and intentional misuse of the "Epilight Medical Device" and concealed the fact they deliberately adulterated ted the "Epilight" thereby leading to many of the painfull injuries suffered by other duped users of the "Epilight" **(See Exhibits 5, 6, 7, and 8, Complaints to the FDA),** and **(See Exhibit #4, Washington Post article of injuries suffered by patients of "Epilight).**

29. The representations made by defendant and each of them were, in fact, false and deceitful and constituted a fraudulent and intentional

concealment of the true facts which are that the "Epilight Hair Removal Medical Device" is not approved for painless permanent hair removal **(See Exhibit #3, Letter from the FDA)**, and is therefore not safe for permanent hair removal on humans.

30. When defendant made representations that they knew were false, they made statements with the intent to defraud, deceive, and conceal the truth from the public in order to increase the number of patients their physicians would treat.

31. Plaintiff, at the time the representations were made, was ignorant of their falsity and believed them to be true. In reliance on the false and fraudulent and deceitfull representations, plaintiff underwent painful "Epoilight" treatments and sustained injuries.

32. The false and fraudulent representations made by defendant were directly and indirectly conveyed to plaintiff and who relied on them, and as a result plaintiff suffered serious injuries.

33. In addition to pecuniary damages as a result of the fraud and deceit of defendants, plaintiff is entitled to actual attorney fees and to punitive and exemplary damages.

SEVENTH CAUSE OF ACTION

NEGLIGENT MISREPRESENTATION

34. Plaintiff incorporates by reference as if fully set forth all of the allegations contained in the preceding paragraphs.

35. The false and misleading representations made by defendant were negligently made, in that defendant knew or should have known that they were, in fact, false and misleading **(See Exhibit #3, Letter from the FDA).**

36. Defendant has the ability to control the actions of its medical staff and physicians conduct with respect to competence, training, advertising, patient-physician conduct, maintenance and display. Yet failed to properly utilize te those controls to prevent abuses.

37. The defendant's relationship with its medical staff and physicians places defendant in the position to protect against the risk of harm, which arises from abuses and misuses by its representative the physicians to their patients. The relationship of the defendants to its doctors and other staff, makes the defendant responsible for their actions and any injuries they caused upon the public and in particular this plaintiff.

38. The negligently made false and misleading representations made by defendants and their failure to exercise controls over its physicians and

other users of the "Epilight Medical Device caused plaintiff's injuries.

EIGHTH CAUSE OF ACTION

NEGLIGENT ENTRUSTMENT

39. Plaintiff incorporates by reference as if fully set forth all of the allegations contained in the preceding paragraphs.

40. The defendant had a high degree of knowledge or should have had a high degree of knowledge concerning its physician users propensity to use the "Epilight" device in an improper or adulterated fashion **(See Exhibit 4, Washington Post Article) (See Exhibits #5, 6, 7 and 8, Complaints to the FDA)**, and extends the duty to defendant to prevent those abuses by its physician users where defendant knows or has reason to know those users would be or are engaging in adulterated uses, fraud, misrepresentations **(See Exhibit 1, Consent Form)**, and false advertising on a consistent basis.

41. But for defendant's failure to ensure that its physician would use the device in a proper an lawful manner, plaintiff would not have sustained injuries.

NINTH CAUSE OF ACTION

OUTRAGEOUS CONDUCT AND GROSS NEGLIGENCE

42. plaintiff incorporates by reference as if fully set forth all of the allegations contained in the preceding paragraphs.

43. The deceitfull conduct of defendant in placing into the streams of commerce the "Epilight Hair Removal Medical Device" for the adulterated use and purpose of permanent hair removal, for use on the human body, was so outrageous, malicious, reckless, willfull, and in wanton disregard of the rights of the public at large and the plaintiff particular, that it warrants the assessment of punitive and exemplary damages in a sum to be deemed fair and reasonable by the trier of fact.

44. The willful and wanton conduct of defendant in total disregard of the rights of the plaintiff caused plaintiff's injuries.

WHEREFOR, plaintiff requests judgement against defendant as follows:

1. General compensatory and pecuniary damages of $1,000,000.00 (One Million Dollars) or as deemed fair and reasonable by the trier of fact;

2. Punitive damages in the sum of $5,,000,000.00 (Five Million Dollars) or as deemed fair and reasonable by the trier of fact;

3. Costs and disbursement of this action; and

4. Such other and further relief as the court deems just, proper and equitable.

The plaintiff demands that this action be tried to a jury and, to ensure that this pro se plaintiff is granted the wider latitude allowed pre se litigants, and to ensure that this pro se

plaintiff has that fair opportunity to present his case against the experienced and practiced opposing counsel, plaintiff asks the following:

(A) That all pre-trial arguments in support of motions or pleadings and all the respective rulings, be presented in writing.

(B) That pursuant to 16.1-93 of the Code of Virginia, that every action proceeding in a court not of record shall be tried according to the principles of law and equity, and when the same conflict the principles of equity shall prevail. No warrant, motion or other pleading shall be dismissed by reason of a mere defect, irregularity or omission in the proceedings or in the form of the pleadings and enter such orders as may be necessary to correct any such defects, irregularities and omissions, and to bring about a trial of the merits of the controversy and promote substancial justice to all parties. The court may make such provisions as to costs and continuances as may be just.

(C) That pursuant to 8.01-275 of the Coe of Virginia, that no action or suit shall abate for want of form where the Motion for Judgement or Bill of Complaint sets forth sufficient matter of substance for the court to proceed upon the merits of the cause. The court shall not regard any defect or imperfection in the pleading, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgement,

according to law and the very right of the cause, cannot be given.

ALLEN V. JAFFE

By: (Signature of Allen V. Jaffe)
Allen V. Jaffe, pro se

Allen V. Jaffe
3211 Fox Chase Drive
Midlothian, Virginia 23112
804-543-2670
Fax 804-675-4828

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S CLAIM ON THE GROUND THAT IT WAS RES JUDICATA BECAUSE:

1. The previous actions asserted as bars, which were tried by the same judge were based on prejudice and bias and not on the merits of those cases. That prejudice and bias against the plaintiff tainted the rulings and affected the outcomes of the hearings and resulted in dismissals so that the plaintiff was denied a fair trial and a proper final decree on the merits of those cases; and as a consequence, those improper and tainted dismissals to which he objected, in the previous cases did not constitute final and fair judgements on the merits and therefore cannot be used to support a claim of res judicata.

2. The defense of res judicata has the burden of proving by a preponderance of the evidence that an issue was previously raised and decided in an appropriate court in a prior cause of action (Fodi's v. Rutherford, 26 Va. App. 466, 449, 495 S.E.2d 503, 505(1998)(Worrie v. Boze, 198 Va. 533, 538, 95 S.E.2d 192, 197 (1956); Commonwealth ex. rel. Gray V. Johnson, 7 Va. App. 614, 618, 376 S.E.2d 787, 789 (1989). But no such burden was met.

3. The defense of res judicata must prove the identity of: (1) the remedies sought: (2) the identity of the causes of action; (3) the identities of parties; and (4) the identity of the quality of the

persons for or against whom the claim is made (Highsmith v. Commonwealth, 25 Va. App. at 440, 489 S.E.2d at 241) defense has failed to meet that burden because there is neither an identity of the remedies sought nor an identity of the causes of action (Wright, 232 Va. at 222, 349 S.E.2d at 128), nor an identity of the quality of the persons for or against whom the claim is made.

4. It is well settled that res judicata may not be taken advantage of by demurrer where the pleading demurrer to does not show on its fact the existence of the matters relied on to support the application of the doctrine (Martin v. Martin, 167 Va. 206, 211, 212, 188 S.E. 148, 150)(30 Am. Jur., Judgements, Sec. 264, P.989; 50 C.J.S., Judgements, Sec 824, PP. 393, 394, 395, and cases cited). This is so because a demurrer stands or falls by what appears on the face of the pleading at which it is aimed. And so resort cannot be had to another pleading for the purpose of supporting the demurrer (6 Michie's Jurisprudence, Va. and W.Va., Demurrers, Sec. 26, P.24, and cases there cited), and yet Virginia Phototherapy, L.L.C., took advantage of demurrer to support the application of res judicata over plaintiff's objections.

5. The fact that the previous actions had been tried in the same court by the same judge did not dispense with the necessity of proof of the records in the previous actions. To sustain a claim of res judicata the court will not take judicial notice of the record in the first suit (30 Am. Jur., Judgements, Sec. 273, P. 993; 50 C.J.S., Judgements, Sec. 836, P. 404.) It is appropriate to point out that ordinarily to sustain the allegation of res judicata, the whole

record of the former proceeding must be put in evidence (See Freeman on Judgements, 5th Ed., Sec. 1030, PP. 2147, 2148; Jones' Commentaries on Evidence, 2d Ed., Sec. 1886, P. 3514; 30 Am. Jur., Judgements, Sec. 274, P. 993; 50 C.J.S., Judgements, Sec. 843-C, P. 417). Generally, only an inspection of the entire record in the first actions will disclose whether the identical issues in controversy in the pending suit was settled in those previous litigations. In this matter, no records, evidence or testimony were presented or heard during the motions hearings the allegation and therefore the claim of res judicata could not and should not have been sustained.

6. Judge Hammond, after granting plaintiff's Motion to Disqualify for prejudice and subsequently recusing herself; over plaintiff's objections, sustained the defense plea of res judicata and dismissed the case and over plaintiff's objections.

VIRGINIA:

IN THE CIRCUIT COURT OF HENRICO COUNTY

ALLEN V. JAFFE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	CL02-1729
RONALD MARK LANDESS, DPM,	)	
	)	
Defendant.	)	

FINAL ORDER

On August 22, 2003, came plaintiff Allen V. Jaffe, *pro se*, and defendant Ronald M. Landess, by counsel, on the Special Plea, Motion for Sanctions, and Motion to Compel and for Sanctions filed by defendant Ronald M. Landess and on the Motion to Disallow Defendant's Request for Admissions and Motion for Protective Order of plaintiff Allen V. Jaffe, all of which were duly noticed for hearing;

It appearing from a review of a certified copy of the Court's file introduced into evidence in this proceeding that plaintiff Allen V. Jaffe has previously filed an action styled Jaffe v. Virginia PhotoTherapy, LLC, No. CL01-1543, that such action was dismissed with prejudice by Order dated April 9, 2002, and that Jaffe failed to appeal such decision; and

It appearing from a review of a certified copy of the Court's file introduced into evidence in this proceeding that plaintiff Allen V. Jaffe has previously filed an action styled Jaffe v. Virginia PhotoTherapy, LLC, No. CH01-1438, that such action was dismissed with prejudice by Order dated March 8, 2002, and that Jaffe failed to appeal such decision; and

It appearing from a review of a certified copy of the Court's file introduced into evidence in this proceeding that plaintiff Allen V. Jaffe has previously filed an action styled Jaffe v. Virginia PhotoTherapy, LLC, No. CL01-2094, that such action was dismissed with prejudice by Order dated August 8, 2002, and that Jaffe failed to appeal such decision; and

It appearing from a review of a certified copy of the Court's file introduced into evidence in this proceeding that plaintiff Allen V. Jaffe has previously filed an action styled Jaffe v. Virginia PhotoTherapy, LLC, No. CL02-1730; that such action was dismissed with prejudice by Order dated January 24, 2003 on the basis that the claims and causes of action asserted therein were barred by the doctrine of res judicata by virtue of the final adjudications referred to above; that Jaffe attempted to appeal such decision to the Virginia Supreme Court; and that by Order dated June 25, 2003, the Virginia Supreme Court denied his Petition for Appeal and by Order dated September 12, 2003 denied his Petition for Rehearing; and

In connection with this ruling, the Court receives into evidence the certified copy of the

Virginia Supreme Court's September 12, 2003 Order denying Jaffe's Petition for Rehearing and dismissing his appeal of No. CL02-1730; and

It appearing to the Court that all of the above referenced actions arose from the same hair removal treatments provided by Virginia PhotoTherapy, LLC which form the basis of the subject action; and

It appearing to the Court from the Stipulation of the parties introduced into evidence in this proceeding and the exhibits thereto that at all times relevant to this action defendant Ronald M. Landess has been the sole member and manager of Virginia PhotoTherapy, LLC; and

It appearing to the Court from a review of the allegations of the Complaint herein that each of the claims and causes of action asserted against defendant Ronald M. Landess have been previously asserted against Virginia PhotoTherapy, LLC, in one or more of the above-referenced actions; and

It appearing to the Court based upon all of the foregoing that defendant Ronald M. Landess is in privity with Virginia PhotoTherapy, LLC for purposes of the Court's consideration of the defendant's Special Plea of res judicata herein; and

It appearing to the Court that each of the elements of res judicata has been proven by defendant Ronald M. Landess;

Upon consideration of the foregoing findings and the authorities cited by defendant in memoranda in support of his Special Plea, and for

the reasons stated in the Court's opinion letter dated September 17, 2003, it is hereby ORDERED that the defendant's Special Plea be sustained and that this action be DISMISSED WITH PREJUDICE; and that

Defendant's Motion to Compel and for Sanctions pursuant to Rule 4:12(c) and Motion for Sanctions pursuant to Virginia Code § 8.01-271.1 be DENIED; and that

Plaintiff's Motion to Disallow Defendant's Request for Admissions and Motion for Protective Order be DENIED.

There being no further motions or matters requiring consideration by the Court, this matter shall be placed by the Clerk among the ended cases.

ENTER: [October 20, 2003]

[Judge Gary A. Hicks]
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF HENRICO COUNTY

ALLEN V. JAFFE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	CL02-1729
	)	
RONALD MARK LANDESS, DPM,	)	
	)	
Defendant.	)	

ORDER IMPOSING SANCTIONS

This day came defendant Ronald M. Landess, by counsel, and moved for sanctions against plaintiff Allen V. Jaffe;

As set forth more fully in the Court's Final Order dated October 20, 2003, prior to filing this action, Jaffe had filed four (4) previous actions against Virginia PhotoTherapy, LLC, all arising from the same hair removal treatments which form the basis of this action and all of which had been adjudicated adverse to Jaffe. The Court finds that Jaffe lacked a good faith basis for bringing this action;

In addition, simultaneously with filing this action, Jaffe filed another case against Virginia PhotoTherapy, LLC, No. CL02-1730. This action

had been dismissed by this Court by Order dated January 24, 2003 and Jaffe's Petition for Appeal had been rejected by the Virginia Supreme Court by Order dated June 25, 2003. The Court finds that Jaffe lacked a good faith basis for continued prosecution of this case after entry of the foregoing Orders;

In response to the filing of this action, Landess filed a Special Plea asserting the defense of *res judicata* and on August 8, 2003, filed his Memorandum in Support of Special Plea in which he set forth authorities which compel the conclusion that this matter was barred by *res judicata.* Jaffe failed at the hearing of this matter to present any contrary authority or to distinguish the authorities cited by Landess and, after being given leave to file a post-hearing memorandum, failed in either of his post-hearing memoranda to cite any contrary authority or to distinguish the authorities cited by Landess. The Court finds that Jaffe lacked any good faith basis for his continued prosecution of this matter after receipt of the Memorandum in Support of Special Plea;

In connection with the preparation for hearing of this matter, Landess propounded a Request for Admissions to Jaffe which sought merely his admission as to the authenticity of pleadings and Orders entered in his prior actions against Virginia PhotoTherapy, LLC. Jaffe refused to admit the authenticity of these documents without any good faith basis for doing so. This caused substantial inconvenience to the Clerk of this Court and the Clerk of the Virginia Supreme Court and expense to

Landess in preparing and producing certified copies of these Court records at the hearing of this matter;

The Court issued its opinion by letter dated September 17, 2003 in which it sustained Landess' Special Plea of *res judicata* and instructed the parties to submit a sketch Order in accordance with the Court's rulings. Counsel for Landess timely prepared a sketch Order and submitted same to Jaffe for comment and/or endorsement. Jaffe failed and refused to endorse the Order or to offer any comments to it, necessitating the scheduling of a hearing for presentation of the sketch Order. Notwithstanding that the hearing was duly noticed for October 20, 2003, Jaffe failed to appear. The Court finds that Jaffe lacked any good faith basis for refusing to endorse the sketch Order or for failing to appear at the hearing which was necessitated by his failure to endorse the sketch Order;

After entry of the Final Order at the hearing noticed for that purpose on October 20, 2003 at which Jaffe failed to appear, Jaffe filed a Motion to Vacate said Order. In this Motion to Vacate, Jaffe does not raise any new matter; rather he merely reasserts arguments previously considered and rejected by this Court. Jaffe initiated the hearing for November 10, 2003 and noticed counsel for Landess to be present whereupon counsel for Landess brought on the Motion for Sanctions. The Court finds that Jaffe lacked any good faith basis for filing the Motion to Vacate or bringing it on for hearing;

Upon the basis of the foregoing findings, the Court amends its Final Order dated October 20, 2003 to delete its denial of Landess' Motion for

Sanctions and Motion to Compel and for Sanctions and hereby awards sanctions pursuant to Virginia Code § 8.01-271.1 and Rule 4:12(c) against plaintiff Allen V. Jaffe in the amount of $[350.00, plus court reporter fees. Judgment shall be entered in favor of defendant Ronald M. Landess in such amount including judgment interest from the date of this Order until payment is made. Jaffe's Motion to Vacate said Final Order is denied. In all other respects, the Final Order entered on October 20, 2003 is affirmed and shall be the final judgment of this Court.

ENTER: [November 10, 2003]

[Judge Gary A. Hicks]
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ALLEN V. JAFFE,

Plaintiff,

v. Civil Action No. 3:30cv799

LISA SPICKLER GOODWIN; JOHN R. WALK; HIRSCHLER FLEISCHER; VIRGINIA PHOTOTHERAPY, L.L.C.; DR. RONALD MARK LANDESS; and JUDGE CATHERINE HAMMOND,

Defendants.

ORDER

Having reviewed the Complaint and the Amended Complaint herein, and the Motions to Dismiss the Amended Complaint filed by all defendants, and having reviewed the plaintiff's Motion to Present All Arguments on Motions and Special Pleas In Writing, and the responses thereto, and it appearing from the record that all claims asserted in this action are inextricably intertwined with the cases decided by the Circuit Court of Henrico County, review of which was denied by the Supreme Court of Virginia, it is hereby ORDERED that the Motion to Dismiss this action is granted because the Court lacks subject matter jurisdiction

herein under the Rooker-Feldman doctrine. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Hurdle v. Commonwealth of Virginia Department of Environmental Quality, 227 F. Supp. 2d 549, (E.D. Va. 2002). The action is DISMISSED without prejudice to any appeal currently pending in the state court system or from the decisions of the Supreme Court of Virginia.

In view of the decision to grant the Motions to Dismiss this action, it is hereby ORDERED that the plaintiff's Motion to Present All Arguments On Motions And Special Pleas In Writing is denied as moot.

It is further ORDERED that the facts and legal contentions are adequately presented in the materials before the Court and oral argument would not aid the decisional process.

The Initial Pretrial Conference set for January 22, 2004 is cancelled as no longer necessary.

This Order may be appealed by the plaintiff. Any appeal from this decision must be taken by filing a written notice of appeal with the Clerk of the Court within thirty (30) days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

Nothing herein shall foreclose further prosecution of the pending motions under Fed. R. Civ. P. 11 as to which the requisite safe harbor letters previously have been issued to the plaintiff by the defendants. Therefore, the Court shall retain

jurisdiction for the purpose of adjudicating such motions.

The Clerk is directed to send a copy of this Order to the plaintiff and to counsel for the defendants.

It is so ORDERED.

[Robert E. Payne]
United States District Judge

Richmond, Virginia
Date: January 7, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ALLEN V. JAFFE,

Plaintiff,

v.

Civil Action No.
3:30cv799

LISA SPICKLER GOODWIN;
JOHN R. WALK; HIRSCHLER
FLEISCHER; VIRGINIA
PHOTOTHERAPY, L.L.C.;
DR. RONALD MARK LANDESS;
and JUDGE CATHERINE HAMMOND,

Defendants.

ORDER TO SHOW CAUSE

Having reviewed the pleadings in this case and having reviewed the file in Jaffe v. Virginia PhotoTherapy, Dr. Ronald M. Landess, Alley Thurston, Lumenis, Ltd. and Lumenis, Inc., Civil Action No. 3:02cv538 ("Action No. 538"), and having compared the allegations in the Amended Complaint in this action with the allegations in Action No. 538, and the other civil actions filed in the state court as described in the pleadings in this action, and it appearing that the Complaint filed herein is frivolous and is interposed for the purpose of vexation and harassment, the plaintiff is hereby ORDERED to show cause in writing, by February 9,

2004, why he should not be enjoined from further filing any actions in this Court against any person who is a defendant in this action or any of the cases mentioned in the pleadings herein arising out of the facts and circumstances of this case. The plaintiff shall serve a copy of his response to the order to show cause on counsel for the defendants in this action who may file a response thereto by February 23, 2004, if they so desire. If any response is filed, the plaintiff may file a reply by February 26, 2004.

The Clerk is directed to send a copy of this Order to the plaintiff and to counsel for the defendants.

It is so ORDERED.

[Robert E. Payne]
United States District Judge

Richmond, Virginia
Date: January 7, 2004